UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

DAVID SAXE PRODUCTIONS, LLC and
V THEATER GROUP, LLC, Joint Employers

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 720, AFL-CIO

Cases 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119

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Case 28-RC-219130

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

United they stood, divided they fell. Just as swiftly and ardently as employees joined together, seeking better working conditions and union representation, David Saxe Productions, LLC and V Theater Group, LLC (collectively, Respondents), "put an end to that union shit." In late February, using Facebook and connecting in the theaters, Respondents' theater employees quickly ignited the interest and foundation for a growing campaign in support of joining the ranks of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO (the Union). But within the growing swell of interest, employees trusted the wrong people; they fully disclosed their efforts to the stage managers and others with close ties to management. Thus, the cat was quickly out of the bag and David Saxe, himself, along with his loyal Production Coordinator, Tiffany DeStefano, began taking successive, and ever more severe, action to quash the union efforts.

In quick succession, Respondents interfered with Union meetings, granted unexpected wage increases, and discharged employees, *en masse*. Undeterred, the campaign continued, and even spread to the warehouse facility. However, those efforts were quickly addressed by Respondents by discharging the lead employee organizer, but not before the majority of the warehouse workers expressed their desire to be represented by the Union.

The union campaign continued, and eventually, an election was held among theater employees. And even after that, Respondents continued to target known union supporters by changing their schedules, reducing their hours, issuing discipline, and keeping a close eye on their every move.

Respondents have attempted to mask its conduct and the motivation behind it, every step of the way. But to be sure, Respondents were motivated by only one thing: in the words of David Saxe, himself, Respondents wanted to get rid of the "scumbags" who were on his "shit list" (who just so happened to be gunning for the Union). Respondents' conduct is egregious[1] and should be met with every remedy available in order to redeem employees' rights under the National Labor Relations Act (the Act).

II. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Mara Louise-Anzalone (the ALJ) on September 11 through September 14, September 17 through September 21, October 22 through 26, October 31 through November 2, and November 13. The Further Consolidated Complaint (the Complaint) alleges that Respondents violated Respondents have engaged in, and are engaging in, unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by, inter alia: (1) maintaining overly-broad and discriminatory rules in its employee handbooks; (2) threatening employees with unspecified reprisals, (3) promulgating and maintaining an overly broad directive not to talk to their employees who supported the Union; (4) promulgating and maintaining an overly broad directive or rule not to engage in protected concerted activities; (5) threatening employees with discharge for engaging in protected concerted activities; (6) interrogating employees interrogated their employees about their union membership, activities and sympathies and the union membership, activities, and sympathies of other employees; (7) relocating the time clock and Notice of Petition for Election to the manager's suite; (8) engaging in surveillance of employees to discover their union activities; (9) disciplining employees because they engaged in union and concerted activities; (10) threatening employees with

[1] The conduct addressed herein is so egregious that the Board authorized seeking injunctive relief under Section 10(j) of the Act. Such relief is being sought in the District Court of Nevada, Case No. 2:18-cv-2187.

retaliation for supporting the Union; (11) soliciting grievances and promising to remedy them to discourage support for the Union; (12) granting benefits to discourage support for the Union; (13) implying that union activity was under surveillance; (14) reducing employees' working hours in retaliation for their support for the Union; (15) imposing more onerous working conditions on employees, including closer supervision in retaliation for their support for the Union; and (16) unlawfully discharging ten employees in retaliation for their support for the Union.

At the hearing, on September 11, the ALJ granted the General Counsel's Motion the Amend the Complaint, to allege that Jasmine Hunt (Hunt), Daniel Mecca (Mecca), and Steve Sojack (Sojack) as supervisors and agents under Section 2(11) of the Act, and to change the date of Glick's discharge to on about March 18.[2] Tr. 14:16-17:17. On September 21, the ALJ granted the General Counsel's Motion to Amend Consolidated Complaint, to remove paragraph 7(a), paragraph 7(c), paragraph 7(h), paragraph 7(j), and to amend paragraph 7(e) and paragraph 7(g)(iii). Tr. 1583:23-1584:22; GCX 64. On October 3 the ALJ granted the General Counsel's motion the amend the Complaint to allege that between March 13 and March 19, Respondents, by Mecca, interrogated employees about their union activities in violation of Section 8(a)(1). Tr. 1931:3-1932:25.

On the first day of the hearing, the ALJ issued a sequestration order. Tr. 6:21-7:15. On October 22, Respondents reported a violation of the ALJ's sequestration order. Tr. 2527:7-2529:4. Saxe testified that on about October 17, that he told DeStefano that "we're supposed to do something with these documents, and there's transcripts, and they're in there." Tr. 2529:9-2530:3. Saxe testified that he had the transcripts printed in his office and that he

[2] The parties also stipulated to substitute "unit" for the word "Union" in paragraph 7(g)(3) of the Complaint.

he "didn't articulate" what transcript volumes he wanted DeStefano to "review." Tr. 2531:1-17. Rather, Saxe testified that he "thought the attorneys wanted us to look at them, so I printed it . . . for us to look at them. Tr. 2532:1-19. Saxe initially testified that the stack of transcripts was "probably an inch" singled sided. Tr. 2532:22-2533:12. On October 22, the General Counsel subpoenaed documents relating to the transcripts that were reviewed and any video footage of the locations where the transcripts were reviewed. GCX 103.

After being recalled three days later, on October 25, Saxe changed his story and claimed that the stack of transcripts was "about 3 inches." Tr. 3071:25-3072:5. The second time around, Saxe added that he "didn't instruct [DeStefano] to review other documents. I just said review your transcripts."[3] When asked to explain why he gave DeStefano copies of Gasca, Prieto, and Petty's testimony, Saxe could not give an explanation, but admitted that he highlighted names and put post-it notes with witness names written on them. Respondents did not produce the post-it notes. Tr. 3080:2-2084:25. Saxe also testified that he looked at his own testimony, at least "like the first 20 pages maybe." Tr. 3076:15-20. Notably, when asked if work "Like could you make a request sitting 11 here today and say I want the footage from this day to this 12 day, 2 weeks ago?" Saxe replied "Yes". When asked "So it's possible you could request the footage 15 from the days that all of this was taking place?" Saxe also replied "Yes", but that had not done so. Tr. 3083:25-3084:17. According to Saxe, after DeStefano reviewed the transcripts they did not talk about it at all. Tr. 3535:23-2537:6.

DeStefano testified that Saxe told her that "our lawyers had asked us to review these documents for accuracy" and that the "pile is in the other room." DeStefano then "walked in" and "started skimming through everything." DeStefano spent "a couple of hours" reviewing the

[3] Saxe further testified that after Saxe told DeStefano "we have to review our transcripts or review the transcripts, she asked him "are you sure", to which Saxe replied "the lawyer said we have to do it." Tr. 3086:13-3088:14.

transcripts. Tr. 2540:8-2541:2. The transcripts volumes were not separated in any way; rather it was "just one big stack." Tr. 2541:15-22. DeStefano was able to see who had provided the testimony. At a minimum, DeStefano looked through Prieto, Petty, and Gasca's testimony, but she was say with certainty whether she looked at others.[4] Tr. 2542:18-2544:10; Tr. 2545: 21-2552:1.Contradicting Saxe, DeStefano testified that the stack of transcripts was at least 6 inches thick. Tr. 2545:3-12. Thus, based on the testimony alone, the full scope of DeStefano's review is unknown.

Notably, the third time around, Saxe switched his tune. In contradiction to his earlier testimony, Saxe testified "Well, I couldn't find the footage on my phone because I know it doesn't go back. It's just live, but I tried to pull up just my phone in general, and it doesn't pull up. The cameras don't even have live view. It's not working." Tr. 3641:12-3645:6. Respondents' provided no corroboration that the system is "not working".

Respondents' failure to produce the video footage, the only objective evidence of what DeStefano and Saxe reviewed, supports drawing an inference that the video would be unsavory for them. Moreover, the failure to call the IT manager supports finding an adverse inference that he would have given unfavorable testimony. A judge may draw an adverse inference when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (adverse inference was warranted for respondent's failure to call its production manager to testify about significant disputed matters), enfd. mem. 861 F.2d 720 (6th Cir. 1988); *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1048, n. 8 (7th Cir. 2006) (an adverse inference is warranted when the missing witness was peculiarly in the power of the other party to produce). Respondents did not

[4] The parties stipulated that Saxe gave DeStefano pages 313-413, 414-544, 549-712, 1138-1198, 2401-2436, 1927-2014 of the transcript. Tr. 3073:16-3075:24.

explain they did not call the IT manager. A party's failure to explain why it did not call the witness may support drawing the adverse inference. See *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 n. 1 (1977) (judge properly drew an adverse inference in the absence of an explanation).

Respondents will likely argue that CGC's witnesses should be discredited based on the other sequestration issues that arose. However, as the record shows, although the witnesses communicated with each other, the conversations were limited in scope and they were forthright in disclosing all that they could recall about what was discussed. One witness, Zachary Graham, even took it upon himself to police the rule. Further, based on the content of their conversations, it could hardly be argued that they tainted any testimony because of the isolated topics which were discussed.

III. ANALYSIS OF THE FACTS

A. Respondent's Operations, Policies, and Supervisory Hierarchy

1. Overview of Respondent's Operations

Respondents operate the V Theater Venue and the Saxe Theater in the Miracle Mile shops in Las Vegas, and Respondent DSP also operates a warehouse and office facility on Oquendo Road in Las Vegas (the Oquendo Facility). Tr. 3428:3-8; 3428: 21-23; 54:7-8; 54:24-55:1-4.[5] Tr.

David Saxe (Saxe) is the Owner and President of Respondent DSP and the President and CEO of Respondent V. Tr. 53:20; 54:3. Takeshia "T.C." Carrigan (Carrigan), Respondents' Human Resources Manager, handles recruiting, hiring, issues, concerns, awards, and

[5] GCX___ refers to General Counsel's Exhibit followed by the exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number; ALJX refers to Administrative Law Judge Exhibit followed by the exhibit number; "Tr. _:___" refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing.

terminations for all of Respondents employees. Tr. 714:5-25; 2829:10-11; 2830:22-25. Carrigan deals with the. Tr. 714: 13-25; 2830:22-25. Human Resources Specialist Qiana Brass (Brass) and the front office staff at the Oquendo Facility report to Carrigan, who reports directly to Saxe. Tr. 715:6-11; 2831:4-10.

2. Respondents' Employee Handbooks and Policies

Respondents have a progressive discipline policy, according to Carrigan. As she described, the first step is a verbal warning, and then it escalates to a written warning, which then escalates to suspension or termination. However, progression through the various steps of discipline is limited to the same types of infractions. Carrigan explained that there could be variance based on the severity of the infraction. She also testified that this is the normal practice that is supposed to be followed for warehouse and production employees. Tr.2909-2912.

Respondents maintain two employee handbooks (collectively, the Handbooks): a "V Theater Group LLC Employee Handbook" (V Handbook), applicable to employees at the V Theater Venue and the Saxe Theater, and a "David Saxe Productions Employee Handbook" (DSP Handbook), applicable to Warehouse Technicians at the Oquendo Facility. GCX 99; Tr. 2252:13-15; 2253:3-9; 2254: 2-8; 2254:20-25. The Handbooks are electronically available on Respondents' intranet, called "Paycom." Tr. 2254:10-16.

Respondents maintain the following policies at pages 26 through 28 and 31 through 32 of the V Handbook and pages 27 through 28 and 32 of the DSP Handbook:

> **Email and Communications Activities**
>
> * * *
> The following non-inclusive list contains examples of inappropriate materials that should NOT be sent or received via e-mail or Internet Access:
>
> * * *

- Customized signature lines containing personalized quotes, personal agendas, solicitations, etc., (only information pertaining to name, job title, and contact information should be included).

Blogging

1. Blogging by employees, whether using V Theater Group, LLC's property and systems or personal computer systems, is also subject to the terms and restrictions set forth in this Policy. Limited and occasional use of V Theater Group's systems to engage in blogging is acceptable, provided that it is done in a professional and responsible manner, does not otherwise violate V Theater Group's policy, is not detrimental to V Theater Group's best interests[.]

* * *

3. Employees shall not engage in any blogging that may harm or tarnish the image, reputation and/or goodwill of V Theater Group, LLC and/or any of its employees. Employees are also prohibited from making any discriminatory, disparaging, defamatory or harassing comments when blogging[.]

Non-Solicitation/Distribution
* * *

Requests from outside people or organizations to sell merchandise, solicit contributions, distribute literature, arrange displays, or use Company facilities should be referred to the Human Resources Representative.

GCX 99.

3. Respondents' Theater Operations and Supervisory Hierarchy

The V Theater Venue is a multiplex of smaller theaters: the V1 Theater (also known as "V Main), which has about 400 seats; the V2 and V3 Theaters, which each have 198 seats; and a Stripper 101 classroom (internally called "V4"). Tr. 55:2-7; 55:21-25. The Saxe Theater is about 1,000 feet from the V Theater Venue. Tr. 55:8-11. Respondents have dozens of cameras, which live stream and record footage, throughout all of their theaters. Tr. 80:5-81:8; 82:24-83:1.

Different shows play at each of Respondents' theaters: *Comedy Pet Theater*, *Hitzville Show*, *V - The Ultimate Variety Show*, and *Marc Savard Comedy Hypnosis* play at the V1 Theater; *Zombie Burlesque* plays at the V3 Theater; and *Vegas! The Show*, *Beatleshow*, and *Nathan Burton* play at the Saxe Theater. Tr. 54:24-55:1; 56:12-15; 320:9-12; 3093:19-24; 3165:8-10; 3191:24-3192:1.

Saxe oversees operation of the V Theater Venue and the Saxe Theater. Tr. 54:24-55:1. Jason Pendergraft was Respondents' technical director until about February 21, 2018, when he was discharged for embezzlement. Tr. 305. Production Coordinator Tiffany DeStefano (DeStefano), who reports directly to Saxe, oversees the production department, comprised of Audio Technicians, Lighting Technicians, Spotlight Operators, Stagehands, and Wardrobe Technicians (collectively, the production employees) at the theaters. Tr. 318:11-12; 319:8-11; 759:4-18; 2245:8-9. Stage Managers, who report to DeStefano, directly oversee the production employees at each theater: Stage Manager Steve Sojack (Sojack) supervises production employees at the V1 Theater; Stage Manager Dan Mecca (Mecca) supervises production employees at the V3 Theater; and Stage Manager Thomas Estrada, Sr. (Estrada) supervises production employees at the Saxe Theater. Tr. 320:20-321:12; 782:4-25; 3092:11-17; 3095:22-24; 3165:15-17; 3192:1-3; 3203:19-3204:4. Theater Managers and Assistant Theater Managers oversee Bartenders, Servers, and Porters (who perform janitorial duties) at the Theaters, with Porters sometimes also reporting to Lead Ushers. Tr. 3647:16-21; 3648:5-15; 3653:7-16; 3798:23-3799:9; RX96. Company Manager Shannon Hardin (Hardin), who reports directly to Saxe, oversees the talent (the cast) at the theaters for *Vegas! The Show*, *Zombie Burlesque*, and *V – The Ultimate Variety Show*. Tr. 74:23-75:3; 3409:19-24; 3409:25-3410:15; 3411:11-12.

4. Stage Managers' Duties and Responsibilities

The Stage Managers serve as DeStefano's eyes and ears at the theaters, responsible for applying Respondents' policies and procedures just as DeStefano would during time when she is not on the property or in a different area. Tr. 627:6-22. Stage Managers have the authority to recommend discipline and to issue discipline themselves. Tr. 628:11-23; RX 83. DeStefano mostly follows the Stage Managers' disciplinary recommendations, unless it's a "weird extraneous thing." Tr. 628: 24-629:7.

a. Steve Sojack

Stage Manager Sojack oversees the V1 Theater. Tr. 320:13-19. Sojack designed the cue sheets or tracks, sheets listing the actions to be taken by the production employee in each position, for the shows at the V1 Theater. Tr. 3195:1-5; 3207:18-20. He creates new cue sheets when acts are changed or added and updates the cue sheets once a year. Tr. 3206:19-3208:18. No one reviews or signs off on the cue sheets Sojack designs and updates. Tr. 3224:1-3; 3224:23-3225:1. Sojack decides which employees follow which cue sheets or tracks. Tr. 3195:6-13. For at least a couple of years, Sojack has also been responsible for making a weekly schedule, determining which production employees will work for which shows and at what times. Tr. 3193:17-3194:5.

For the shows themselves, Sojack directs the work of the production employees. Tr. 3194:14-24. He communicates with them by walkie-talkie to indicate show start times, to inform them of any technical problems and how to handle them, and to direct them as to how to handle changes to performers or other aspects of the show, which will change their cues. Tr. 3203:19-3204:11; 3204:12-14; 3222:16-22. For example, when the lighting malfunctioned before a lighting-dependent magic act, Sojack, using his own judgment and experience and considering

various factors, independently decided to put a comedian in place of the magic act, giving the performers and stagehand the necessary directions to make the change. Tr. 3204:18-3206:12; 3222:13-15. Sojack has to make such adjustments and give production employees associated direction on a regular basis. Tr. 3221:24-3222:3; 3222:20-22; 3324:15-21.

Sojack is also responsible for training and overseeing the training of new Stagehands. Tr. 3209:15-23. Sojack decides when new employees are ready to work independently after collecting input from them and employees whom they have shadowed. Tr. 3222:3-14.

In conjunction with these responsibilities, Sojack attends regular Stage Manager meetings (including at least one meeting attended by DeStefano, Mecca, and Estrada) to discuss employee performance, personnel issues, theater and show needs, improvements, and new equipment. Tr. 3211:12-15; 3213:4-23; 3229: 15-3320:8; 3230:25-3231:11; 3225:16-20. Sojack also attended a production meeting with DeStefano, Mecca, and Estrada about a work call at the Oquendo Facility in the spring of 2018. Tr. 3213:1-23.

b. Daniel Mecca

Mecca similarly supervises production employees at the V3 Theater. Tr. 3165:18-20; 3167:18-23. During shows, he uses a headset to speak to Stagehands, Lighting Technicians, Audio Technicians, and the band and cast. Tr.3165:20-21. He directs the work of Stagehands while also running his own track. Tr. 3166:15-16; 3177:18-22; 3178:16-20.

If there is "a scene issue (any issue with light, sound, wardrobe, or anything else that could cause a scene to have a problem) during a show, "[Mecca] is the one who makes the call, [after speaking with the Dance Captain], [to] work together to come up with a solution really fast . . . . something that stagehands cannot do." Tr. 3167:18-23. For example, if a headset is not working, Mecca has to ensure that the sound guy knows Mecca is switching to another

microphone, whether headset or handheld, and figure out the best time to get to the performer to make the switch. Tr. 3178:2-7. If a light breaks during a scene, Mecca assesses the situation, stops what the crew is doing, and figures out how quickly it can get cleaned up while being seen as little as possible, then tells the Lighting Technician what he needs him to do and what Mecca will do, all while taking into account "a lot of variables that take place" and "different factors" that are "different every time." Tr. 3179:16-3180:10. In fact, such improvisations have happened enough that the crew has "gotten good at it." Tr. 3180:14-21.

c. Thomas Estrada, Sr.

Estrada, whom Respondents admit is a statutory supervisor, oversees the Saxe Theater stage. Tr. 499:12-17; GCX 1(ap) at 2; GCX 1(ai) at 2. Estrada ensures that the stage is set and torn and that the stage and backstage areas are clean. Tr. 499:13-17. During shows, he calls cues, using a headset to tell Audio Technicians, the Spotlight Operator, Lighting Technicians, and Stagehands when to perform their respective cues. Tr. 782:4-25; 3092:23-3093:8; 3095:24-3096:2. Estrada acts as DeStefano's "eyeballs" when she is not present and completes show reports documenting which shows were performed, when shows started and ended, and what technical problems or other issues occurred. Tr. 499:17-18; 829:10-12; 2760:23-2763:7; 3131:13-15. 3095:24-3096:2. Estrada has also attended production meetings with other Stage Managers at the Oquendo Facility, where the Stage Managers discussed cleaning up shows by repairing and painting props. Tr. 3099: 3100:17.

5. Respondents' Warehouse Operations and Supervisory Hierarchy

The Oquendo Facility is an over 50,000 square foot two-story building about a 15-minute drive from the V Theater Venue and the Saxe Theater. Tr. 2187:3; 3428: 13-17; 3647:19-22. It Oquendo Facility houses accounting, legal, sales, marketing, IT, and administrative employees

and a call center.[6] Tr. 3545:13-24; 2191:4-18; 3881:9-12. There are also dance studios for auditions and a theater for rehearsals at the facility. Tr. 3428:6-8: 1597:11-13; 1624:13-14. Saxe and Carrigan work out of offices at the facility. Tr. 2186:34-24; 2187:5-6.

Warehouse Technicians, who are based out of the Oquendo Facility, report to Respondents' Office Manager Jasmine Hunt (Hunt) or Saxe, with Carrigan sometimes also giving them direction. Tr.1614:13-19; 1597:6-10; 1598:5-6; 1627:18-1628:1; 1628:15-21; 2174:2-7; 2174:21-2175:21; 2177:15-10; 2184:25-2185:7; 3829:19-23. Warehouse Technicians are not production employees. GCX 106 at 4.

The Warehouse Technicians' main work spaces are the welding area (nicknamed the "welding pit") and the carpentry area in the Oquendo Facility, which are about 25 or 30 feet apart. Tr. 1614: 21-1615:10. There are three welding machines in the welding area. Tr. 1617: 17. The welding area is visible from right outside Saxe's office. Tr. 3269:11-19. There three cameras facing the welding area. Tr. 1611:24-1612:21. There are no walls separating the different parts of the warehouse. Tr. 3251:3-15.

There is a bulletin board in the back of the warehouse where "important things" are kept, including task lists, labor law posters, and announcements of social events. Tr. Tr. 1628:17-1629:14. On the backside of the warehouse, there are cargo doors for receiving deliveries. Tr. 3824:8-21; 3989:19-22. There is an L shaped parking lot outside the building, and a "back part" of the warehouse, called the "outside storage area", where Respondents store their trucks. Tr. 2938:10-21.

Runners transport items and supplies from the Oquendo Facililty to the theater, and vice-versa, using a cargo van or truck. Tr.3861:5-9; 3862: 1-2; 3887:9-11; 3889:12-22. Runners report to the Office Manager and Saxe. Tr. 3861:1-4; 3829: 20-25; RX 93 at 1.

[6] Butts in Seats, LLC handles marketing, sales, call center, and box office operations. Tr. 3428.

B. Theater Employees Spark a Union Campaign

1. Theater Employees Join Facebook Group

About early to mid-February 2018,[7] employee Stephen Urbanski (Urbanski), along with his roommate, David Divito (Divito),[8] started to discuss the prospects of unionizing. Then, on about February 19, they set up a Facebook Messenger group chat to reach out to other theater employees to determine whether others were interested in sparking a union campaign. Tr. 2263:1-21. Devito invited several other employees to join the group, including Leigh-Ann Hill (Hill), Nathaniel Franco (Franco), Jasmine Glick (Glick), Taylor Bohannon (Bohannon), and Zachary Graham (Graham). Soon after, the group began to grow exponentially. Among others, Hill added Stage Manager Mecca and employee Courtney Kostew (Kostew), who was in a romantic relationship with Stage Manager Estrada, to the group on February 21. Tr. 860:12-25; 815:19-816:7; 860:19-22; 861:1-7; 2481:11-24; 3106:9-20; Jt. 2 at 3-4.

From the outset, employees used the Facebook group to gage interest in the Union, spread information about the process, and to organize union meetings. By and large, the participating theater employees expressed support for the campaign, especially Hill who had been a union member before. Franco, Glick, Graham, and Bohannon were also active in the group. The plan, which later unfolded, was to have an employee from each "department" (*i.e.*, Saxe Theater Stagehands, Audio Technicians, and Lighting Technicians and V Theater Stagehands) attend an initial informational meeting with union representatives and then spread the information to other employees within their respective departments. As discussed below, Glick, Bohannon, Graham, Urbanski, stagehand Josh Prieto (Prieto), and another employee

[7] Hereinafter, all dates are in 2018, unless otherwise noted.

[8] Until about December 2017, Divito was Respondents' Head of Audio.

attended the first meeting on about February 28 and were instrumental in spreading information to other employees throughout the theaters. JXT 2; Tr. 1367-1368; 1935-1937; 2263-2265.

2. Theater Employees Attend Union Meetings and Discuss the Campaign at Work

Aside from the Facebook group, various employees were also discussing the union campaign at work throughout late February and early March. For example, during last week of February, Hill reached out to about ten other employees in the Saxe Theater and the V Theater, telling them about the prospects of unionizing and that a union representative may be available to answer any questions they had. Tr. 1024:21-1025:12; 1742-1743. Also, Glick spoke to at least four or five employees about the union in the smoking area of the parking garage and within the theaters, in an attempt to feel out interest. Tr. 1368:10-1370:23. Franco also spoke with employees. Early on, he spoke with a current employee backstage at Saxe Theater by the audio monitors to see if the employee would be interested in organizing, but the employee did not seem interested and brushed it off. Tr. 1287.

The first union meeting was on February 28 or March 1.[9] Of those who were later discharged, Graham, Bohannon, and Glick attended. After this meeting, Graham went to the Saxe Theater and spoke with several stagehands, including Alanzi Langstaff about the Union.[10] The next union meeting was on March 13. Leading up, employees kept talking about the Union and attempted to get other employees to go to the meeting. For example, sometime before the March 13 meeting, Glick spoke with Michaels in the parking garage in between shows at Saxe Theater. Glick told Michaels all about the Facebook group chat and how they were organizing a

[9] The witnesses recalled the meeting occurring on February 28, but the group chat indicates that it was originally scheduled for that date, but was changed to March 1. JTX 2 at 19-24.

[10] The group chat corroborates this fact. Graham states, after discussion of the meeting, that "9 of 16 saxe stagehands say yes with 2 probably yes.. . . Thomas doesn't want in." JTX 2 at 24.

meeting. In turn, Michaels told several employees at the Saxe Theater about the upcoming meeting. Tr. 1519-1520. Lighting technician Scott Tupy (Tupy) was fielding questions during this time about the Union, as he is a long-standing union member. Tr. 1743.

About 10 to12 employees went to the March 13 meeting, despite Respondents' last-minute work call to repair the Saxe Theater stage.[11] Graham stopped by the Saxe Theater before the meeting trying to get employees to attend. He also talked to Estrada, asking him if he was going to go the meeting. Tr. 1655-1657; JXT 4 at 25. About half or more of those who attended the meeting were later discharged, including Franco, Graham, Bohannon, Glick, Suapaia, and Michaels. The next day, Urbanski met up with Glick in the parking garage at the Saxe Theater to sign an authorization card.

C. Leigh-Ann Hill Gets Discharged

1. Hill's Employment History

As discussed above, Hill was an early supporter of the union campaign. Hill worked on the day crew fixing and painting props. She also performed work as a stagehand after being trained by Mecca. Throughout her employment, since August 2017, Hill maintained other, on-call employment at PRG. Then, near the end of February, Hill got an offer to work an outside 4-day gig, from March 8 through March 11, for the "Mint 400" event.

2. Hill Complains About Employees Being Underpaid

On about March 1, Hill approached DeStefano after her shift. They met in DeStefano's office. To begin, Hill told DeStefano about the opportunity to work the Mint 400 gig, which was going to pay $1,000. Hill requested March 8 and 9 off (she already had March 10 and 11 off), explaining that she had "already worked out with the other guys on stage about switching the

[11] See Section III.D.2.a., below.

schedule." Tr. 1027:8-1028:5. DeStefano told Hill that it was not a problem, and that she should "[j]ust put it through Paycom." Tr. 1028:6-8.

Then, Hill raised some ongoing workplace concerns. Hill told DeStefano that "morale was really low" and that employees "were starting to get irritated because David Saxe wants perfection but he doesn't want to compensate us [i.e., employees] for it." Tr. 1028:13-16. Hill explained that it was hard to work there because she did not have the right tools to do her job, and that requests would either get denied or it "would take weeks for [her] to get the things [she] needed." Tr. 1028:17-21. Hill continued, saying that "it was time that we needed to make everything better," explaining that she was tired of being underpaid and that it was the lowest-paying job she ever had in the industry. Tr. 1028:22-1029:1.

DeStefano responded, telling Hill to be patient and explained that Pendegraft "was just recently fired" and they were "starting to work on things to make it better" for everyone. Tr. 1029:2-4; 1030:18-23. Hill, having heard the same "be patient" mantra before, got upset. Tr. 1030:18-23. Hill pushed back, saying things like, "How the fuck am I supposed to do my job if you don't give me the tools I need?" She also said, in reference to the fact that employees were underpaid, "This is bullshit. It's unfair." Tr. 1084:1-1085:14.

At this point, Hill saw DeStefano touch her phone screen and within minutes, Michael Moore (Moore) walked into the office. Moore sat down with them and explained that how management was going to production meetings to try to fix things, but that everyone needed to be "way more patient." Tr. 1029:10-20. As Hill testified, Moore calmed the situation down, not necessarily by what he said, but more by "his demeanor." Tr. 1086:20-1087:6. The meeting ended shortly thereafter.

3. The Facebook Fall-Out

After meeting with DeStefano on March 1, Hill went home and opened the Facebook group chat. Hill noticed a message from Kostew essentially accusing her of feeding information to DeStefano about the union campaign because they were friends. Tr. 1029:24:3; JTX 2 at 25. Kostew expressed concern that "this all may be a setup to fire everybody." JTX 2 at 25. Kostew went on to say that prior attempts to unionize resulted in employees getting fired. *Id*. Kostew also stated that she was raising the issue about Hill and DeStefano because she was "just worried" and could not "afford to be fired." *Id*. Kostew testified that she posted her message because she "heard in the theater that [Hill] was friends with Tiffany DeStefano" and that she was told that management[12] could not find out. Tr. 2958:8-18. *See also* JTX 2 at 25. Kostew never specified from whom she learned this information.

Hill quickly denied Kostew's insinuations on the Facebook chat, emphasizing that she was not friends with DeStefano and that she was a staunch supporter of the union movement. Kostew continued, stating that "There's been cahooting all day and 'I heards' 'I found outs' and all kinds of concerns whispered in hush tones all day." JTX 2 at 26. Kostew also explained that she was addressing what she heard on the group chat because she "need[ed] to play this as safe as possible" because she did not want to lose her job. Id.

Then, Hill told Kostew that no one could afford to lose their jobs, which turned into Hill broadcasting how Saxe "underpays all of [them]." JTX 2 at 27. Hill continued to describe how she was being paid less than promised and was sick of getting the "run around." Id. In response, Kostew pointed out that Hill had only worked at the theaters for six months, but got a raise and was given full-time. Id. at 28. Kostew continued, "That's pretty rad. For you. I've been here

[12] Kostew's message identifies "Tiffany and *upper* management" as those that should not find out about the campaign. JTX 2 at 25 (emphasis added).

almost 2 years and have been waiting for a fuckin $2/hr raise for I don't even know how long.[13] The whole crew has been waiting for raises." Id.

Others started to chime in, emphasizing the need to stay united and to focus on the task at hand: setting up a meeting and distribute authorization cards and getting a count of union supporters. Then, Kostew told the group that she was going to "sit out of this now" because she was "aggravated." JTX 2 at 29.

The argument continued, and divided they fell. Hill challenged Kostew about why everything had to "be a competition," noting that she had different skills than her. Kostew responded, stating that Hill may be good a painter, but that given all the time Hill has on the day crew, the props should be flawless "and they're FAR from it." Id. at 29. Kostew went on, stating, "You really want to tell me your prop painting skill set deserves a higher pay rate than those of us busting our ass on the stage"? Id. Kostew continued, criticizing Hill as a stagehand saying that she "didn't last a week on the stage" because "it was too hard" for her. Id. Kostew's last message was posted at 12:38 a.m. Id. The following morning, on March 2, Hill removed Kostew from the group chat. Tr. 1031:6-16.

4. Respondents Discharge Hill

Hill was scheduled to work on March 2, but was discharged before her shift. Tr. 1032: 5-14. Carrigan called Hill at about 4:30 p.m., and told her that she did not need to come to work. Tr. 1032:110-13; 722:2-6. According to Hill, Carrigan told her that she was terminated effective immediately for "restructuring and retaining other employment." Tr. 1032:20-25. Hill told Carrigan that she had not retained other employment. Carrigan replied that DeStefano told "us" otherwise. Then, Hill said that she had personal items at the theater, but Carrigan told her that

[13] Notably, Kostew received the two dollar an hour raise shortly after airing this grievance. See discussion in Section III.D.2.b.

she was not allowed on the property so they would mail her belongings. Hill told her not to worry about it because she would have a co-worker gather her things. Tr. 1032:22-1033:6. Consistent with her testimony about this conversation with Carrigan, Hill posted, "David Saxe has restructured my position effective immediately," on the group chat shortly after she was discharged. JTX 2 at 30.

Respondents' accounts of the events leading to Hill's discharge and its asserted reasons for the discharge are all over the map. According to DeStefano, at a meeting on February 26, Hill told her that she "took another job" that required her presence from 8:00 a.m. to 5:00 p.m., but could work for Respondents "when needed," except, if she got work for her other job after 5:00 p.m., she would work the new job "because it pays more money." Tr. 325:17-22; 2587:9-24. DeStefano testified that she understood from this conversation that Hill took a permanent position with a regular schedule at this new job. Tr. 325:23-326:5.

DeStefano claims that as a result of this conversation, she decided to discharge Hill. Tr. 322:13-17; 508:10-12; 676:12-15. DeStefano also testified that she told Saxe about this interaction on the day that it occurred. Tr. 507:6-23. According to DeStefano, she was in a bind finding someone to cover Hill's stagehand shifts going forward, so she spoke with Sojack on February 28 about coverage, and he told her that another employee knew Hill's track. DeStefano testified that, upon learning that, she called Saxe and told him that they could discharge Hill the next morning, March 1. Tr. 2589:7-2590:7.

However, DeStefano testified that Hill was not discharged the next morning because she arrived at work before Saxe or Carrigan could call her.[14] Tr. 2588:25-2589:3; 2590:4-7. Then, at some point during her shift, Hill banged on DeStefano's door, walked into her office, and

[14] Inexplicably, although DeStefano apparently had coverage for Hill prior to the March 1 shift, Hill worked as she usually did. There was no explanation from DeStefano of these circumstances.

screamed, "What the F, am I fired?!" Tr. 2588:14-20. Hill said she heard another employee talking about running her track over the weekend.[15] Then, DeStefano, rather than explain that she had allegedly decided to fire her, told Hill that the other employee was backup because Hill "mentioned Monday [February 26] that [she] may not be able to come in this weekend." Tr. 2588:20-24. Then, because she was so afraid of Hill, DeStefano dialed Moore's extension hoping that he would come to help. DeStefano explained that she did not tell Hill that she was "termed right there" because she "was afraid of what she would do." Tr. 2590:11-23.

DeStefano further testified that when Moore arrived, they discussed "the situation from Monday" and "from that day." Apparently, Moore sided with DeStefano saying, "I agree this is not something we can do. You can't just up and leave your full-time position and not give us some sort of consistency or some sort of move to part-time." Tr. 2591:1-12. But, DeStefano told Hill that she would speak to Human Resources and get back to her the next day. Tr. 2591:6-7. Then, Hill said thanks and left. Tr. 2591:13-15.

According to DeStefano, she called Saxe after the March 1 incident, told him what happened, and asked whether he was going to discharge Hill in the morning. He confirmed that "we'll do it in the morning." Tr. 675:6-24. DeStefano also claims that she spoke with Carrigan the next morning before Hill was discharged to "give her a little bit of the story behind it." Tr. 676:6-14.

Carrigan disputes that she ever had a conversation with DeStefano about Hill's termination prior to the fact. Tr. 716:16-18; 719:21-24; 2111:813-24. Rather, Carrigan testified that Saxe called towards the afternoon on March 2. Tr. 722:2-6. Saxe explained to her that although he planned on discharging Hill himself, he was tied up with a personal matter. He asked

[15] Which begs the question, if the coverage was planned for the weekend, what was the plan for March 1, when Hill was allegedly supposed to be fired?

Carrigan to do it instead. Saxe told Carrigan that Hill was being discharged because she "was unable to comply with [Respondents'] scheduling due to her secondary job." Tr. 719:13-18. Carrigan testified that all she learned from Saxe was that Hill could not comply with DeStefano's scheduling and that Hill was not prioritizing the company. Tr. 720:15-20. Carrigan clearly testified that she did not learn anything else about the reason for Hill's discharge prior being told to inform Hill of the decision. Tr. 2112:7-13.

Based on the breadth of the testimony from DeStefano, Carrigan, and Saxe, Hill was discharged, primarily, because she took another job and could not comply with her full-time schedule based on the version of events described above. However, DeStefano and Saxe also testified that Hill had been a target of theirs since at least January because she was not a good worker. As an example of Hill's poor performance, Saxe and DeStefano harped on an incident from October 2017 when Saxe caught Hill dancing and singing while on the job as he monitored the theater surveillance cameras from his cell phone.[16] Tr. 3480:23-3483:25.

5. Respondents' Version of Events Should be Discredited

For various reasons, Respondents' version of events should be discredited, including when the decision was made to discharge Hill and why. First, although Sojack was called as a witness for Respondents and even asked a few questions about Hill, Respondents' counsel failed to elicit any testimony to that would have corroborated the timing of DeStefano's apparent decision to discharge Hill before the March 1 meeting. DeStefano testified that she talked with Sojack on February 28 about coverage for Hill's track, but Sojack offered no testimony about this. Accordingly, Respondents' failure to make any attempt to elicit presumably favorable

[16] Although Respondents' witness downplayed the surveillance system's ability to capture audio, Saxe was apparently able to hear Hill sing on this occasion. Interestingly, although Saxe testified that his restructuring plan was premised on getting more employees who loved theater, just like he and DeStefano do (Tr. 3469), he apparently does not think that an employee who sings and dances epitomizes this quality.

testimony on a key issue should lead the ALJ to find that Sojack would not have been able to corroborate DeStefano's version of events.

Similarly, Respondents failed to call Moore as a witness to corroborate what happened during the March 1 meeting. In fact, it does not appear that Moore was even subpoenaed by Respondents' counsel to testify. Moreover, it is likely that surveillance footage would be available of this meeting and Respondents did introduce any such evidence. Surveillance footage, even if the audio was of poor quality, or not there, would shed light on what happened during this meeting. But again, Respondents wholly failed to make any attempt to corroborate DeStefano's testimony in any way whatsoever. In the least, the ALJ should consider Respondents' failure when resolving the credibility issues at stake.

Finally, Carrigan's testimony on what she learned about the circumstances underlying Hill's discharge, and when she learned it, are highly suspect. In sum, she testified that she only learned about the secondary job concerning scheduling prior to calling Hill or even filling out the termination form, but records show that she learned something about "attitude" at some point before. She also revealed that during the course of preparing to litigate this case, DeStefano added a notation on Hill's termination form, which originally only stated "poor attitude" as a reason, to include "+s secondary employment." Tr. 719-728; 2111-2126 (and various documents cited to before). Accordingly, Respondents' paper trail and related testimony casts serious doubt that Hill's secondary employment had anything to do with her discharge, which is consistent with Hill's testimony that she only requested a few days off for a short-term gig, that had been approved by DeStefano.

D. Respondents "Put an end to the Union Shit"

1. Respondents' Supervisors Learn of the Campaign

a. Estrada Sees Graham Engaging in Union Activity in February

Saxe and DeStefano testified that they did not "officially" learn about employees' efforts to unionize until about April 27, when Saxe received notice that the Union filed a petition for an election. Tr. 509:13-510:19; 3473:8-11; GCX 35. Saxe testified that he was in disbelief on April 9 when Respondents received an unemployment claim from Glick stating that she was discharged for union activity. Tr. 3472:20-3473:2. Saxe and DeStefano also testified that on about April 10 they learned that Graham, who had not been working due to a broken arm, was engaging in union activity. According to Saxe, he learned from DeStefano that Graham "was backstage or handing out something." Tr. 3473:16-20. DeStefano testified that she learned about Graham's activity from Estrada who told her that "there was a former employee harassing current employees." Tr. 2614:5-17. She asked Estrada what was going on and he explained that Graham was "outside . . . asking for signatures or something for a card." Tr. 2614:13-15. DeStefano testified that she had "no clue" what Estrada was talking about and had no idea "where harassing came in," but decided to call Saxe because she "didn't know what to do with former employees on property." Tr. 2614:18-20. Then, after simply telling Saxe that Graham was "harassing our current employees with a card of some sort," Saxe was able to conclude that it must have something to do with the Union. Tr. 2614:18-24. According to Saxe, after speaking with DeStefano he thought to himself, "[O], no, maybe they are unionizing." However, Saxe maintained that he was still unsure whether there was a campaign going on; "It wasn't solid" at that point. Tr. 3473:12-20.

Estrada, for the most part, corroborated the incident, but let slip that the incident actually occurred in February. Tr. 3101:20-3102:2. Further, Estrada never described Graham as a "former" employee while testifying about this incident, nor did he ever describe Graham's conduct as "harassing." According to Estrada, he was in the tech room when an employee, possibly John "Tam" Lam,[17] told him that Graham was in the parking lot "talking to people about the Union" or "handing out cards." Tr. 3102:3-3103:7; 994-995. After learning this, Estrada went to see for himself and poked his head out the entrance door. Sure enough, Graham was outside, about ten feet from the door. Tr. 3102:3-3104:5. After that, Estrada called DeStefano and told her that Graham was "out here passing union cards, and whatever that is, I don't know." Tr. 3104:5-19. Estrada asked whether he should say anything to Graham, and DeStefano replied, "[N]o, just leave him alone." Tr. 3104:18-22. DeStefano said she would "take care of it." Tr. 3104:21-22.

Indeed, Graham was talking with employees about signing union cards near the end of February right outside the theater doors to the parking garage. On about February 28, about a week after Graham broke his arm, stagehand Alanzi Langstaff (Langstaff) spoke with Graham about the campaign in the parking garage. Tr. 1825:13-1826:7. Initially, Graham approached Langstaff inside the Saxe Theater and they walked outside to speak about the Union. Graham asked him if he would be interested in joining the Union. Langstaff said, "[F]or sure." Then, Graham told Langstaff that he should get a union card from Glick. At some point in the

[17] The ALJ should also find that Lam told DeStefano about the Facebook group that he had access to, based on his incredible testimony. Tellingly, when asked whether he ever discussed any union activity with DeStefano, he denied doing so, but offered, out of nowhere, that he specifically did not tell her about the Facebook group. Tr. 996. There would be no reason for Lam to offer such a specific denial unless he was intending to specifically cover this up. Thus, the ALJ should not only discredit Lam's denial, but find that the opposite is true. *See NLRB v. Howell Chevrolet Co*., 204 F.2d 79, 86–87 (9th Cir. 1953), affd. 346 U.S. 482 (1953) (where a tribunal discredits a witness, it may find, "not only that the witness' testimony is not true, but that the truth is the opposite of his story"); *Shamrock Foods Co.*, 366 NLRB No. 117 (2018).

conversation, Estrada came outside the doors and was watching them. After Graham walked away, and as Langstaff walked passed Estrada, Estrada told Langstaff to be careful talking with Graham and that he would not be seen talking with him. Tr. 1826:16-1827:4; 1870:20-1872:11.

Graham's testimony corroborates Langstaff's. Although Graham did not testify about this particular conversation with Langstaff, Graham testified that after the first meeting, on February 28, he went to the theaters for a dual purpose: he spoke with DeStefano about FMLA and also spoke with the stagehands about unionizing. Tr. 1651:4-1653:20. Graham also spoke with Estrada in between cues at stage left. Estrada sat on some stairs that are connected to a catwalk as Graham pitched the benefits they would receive from unionizing. Estrada told Graham he was not interested in being part of it.[18] The conversation ended, and Graham went on to speak with other stagehands. Tr. 1652:5-1653:8.

b. Employees Speak with Stage Managers About Union Meetings

Just as Graham spoke with Estrada about the campaign, employees did not hide the union efforts from any of the Stage Managers. As mentioned above, Mecca was added to the Facebook group chat on about February 21, but was eventually removed from the group on March 2. JTX 2 at 3, 31. Mecca testified that he was invited to the group chat, but that he declined the invitation[19] because he does not like to "mix business and pleasure," indicating that he was unaware of what was taking place on the group chat. Tr. 3172:15-3173:2. On cross-examination, he recalled seeing a notification stating that Divito invited him to the group. Tr. 3184:6-14. Then, after acknowledging that Divito did not work with him at the time (hence, no mixing of business with

[18] The ALJ should discredit Estrada's denial that Graham ever spoke with him about the Union. Estrada's testimony was often meandering and he made outlandish other denials. For example, he initially denied talking to anyone, ever, about the union campaign. Tr. 819-821.

[19] Hill explained that there are two types of Facebook chat groups: one that requires you hit a join button, and one that automatically enters the person. Tr. 1127:24-1128:18.

pleasure), and being pressed on whether he knew if any people he worked with were included in the group chat, Mecca copped that "[w]hen you get an invite, you can glance at it" and he saw other "familiar names." Tr. 3184:14-3185:5. Mecca also testified that because he's "not a very slow person," he "caught on that there was some drama happening" on the chat. Finally, after continued questioning on what he could actually see when he got the notification, Mecca revealed that he had access to the full chat thread, and browsed enough to learn that certain employees were complaining about the company. Tr. 3185:3-3186:18.

Employees also spoke with the Stage Managers about the union meetings. Although Mecca testified that he did not learn about the organizing drive until after Hill and Stagehand Michael Gasca (Gasca) were discharged, Mecca never specifically denied that Hill spoke with him during the last week of February about the Union. Hill testified that at that time, she approached Mecca inside the V3 Theater. She asked whether he would be interested or available to go to a meeting, or interested in joining the campaign. Tr. 1025:13-1026:23; 1121:9-25. Mecca told her that he did not want to rock the boat with his job because he was in a "legal situation." Tr. 1026:1-6. The ALJ should credit Hill's testimony over Mecca's general denial. First, Hill's testimony on this is consistent with her comments on the chat group. On February 21, Hill posted, "I can chat with Dan Mecca." JTX 2 at 3. It is likely that she followed through on that. Second, Mecca did not affirmatively deny ever having a conversation with Hill about the Union or provide any testimony as to whether he had been in the midst of a "legal situation" at that time. Finally, Hill answered questions in a forthcoming manner, never wavered under cross-examination, and readily admitted unsavory things such as using curse words, whereas, as illustrated with his testimony about the group chat, Mecca was evasive and curt at times.

Mecca also spoke with current employee Darnell Glenn (Glenn) about one of the union meetings. After the March 13 meeting, and before Glick was discharged on March 18, Mecca spoke with Glenn. Mecca asked him if he knew anything about "this union meeting?" Tr. 1892:10-1893:2. Glenn told him that he actually went to the meeting. Then, Glenn asked Mecca if he was interested in going to union meeting. Mecca said that he did not want anything to do with the Union and explained that he had a bad experience with a union when he lived in Los Angeles. Tr. 1893:1-12. Notably, this incident occurred just after Mecca, as discussed below, attended a production meeting with upper management on the same day the union meeting took place. Although Mecca testified that he only had one conversation with Glenn about the Union, which occurred after Glick was discharged, Mecca never specifically denied asking Glenn if he knew anything about the union meeting. In fact, Mecca was never asked whether he even knew there was a union meeting. The ALJ should credit the testimony of Glenn, as a current employee testifying against his own interest, about this incident over Mecca's barely there denial.

Current employee Josh Prieto (Prieto) spoke with Stage Manager Sojack about the February 28 meeting and the March 13 meeting, both before and after each meeting. All four conversations took place inside the V1 Theater. The first conversation occurred a few days before the February 28 meeting. Prieto approached Sojack and felt him out by asking what his views were on unions. Sojack answered that supported the right to organize. Then, Prieto revealed that he was going to go to meet with union representatives and learn more about the Union. Tr. 1938:5-1939:4. Then, a few days after Prieto went to the February 28 meeting, he told Sojack all about it. He informed Sojack about what the Union had to offer and said that he felt good about it. Sojack nodded in agreement. Tr. 1939:5-1940:2. About a day before the March 13 meeting, Prieto spoke with Sojack again. He invited Sojack to the meeting and said that he was

trying to get as many people to go as possible. Sojack told him that he would try to go, but he did not attend. Tr. 1940:3-22. Then, on March 14, Prieto asked Sojack why he did not attend or at least let him know that he was not coming. Sojack responded that he just ended up being busy. At that point, Prieto got the impression that Sojack "was distancing himself from the whole thing." Tr. 1941:2-18. Notably, as discussed more fully below, Sojack attended a production meeting with upper management and the other Stage Managers on March 13. Sojack also admitted that several employees were openly speaking about unionizing at the theaters. Tr. 3201:20-3202:3.

Prieto also had a run-in with Estrada before the March 13 meeting indicating that Estrada was aware of the union campaign. On either March 10 or 11, Prieto went to the Saxe Theater to deliver a paycheck to a performer. While he was there, he asked around to see if Kostew was around because he wanted to invite her to the upcoming union meeting. Prieto went towards the parking garage to see if Kostew was on break in the smoking area. As he popped his head out of the doors, Estrada came up next to him, nearly at the same time. Tr. 1943:21-1946:16; 2002:9-2005:23. Then, according to Prieto, Estrada "said that he was going to put an end to this union shit." Tr. 1944:11-13. Prieto did not respond and Estrada walked away. Tr. 1944:12-16. Further, as noted above in Section III.B.2, Graham invited Estrada to the March 13 meeting.

c. Evidence Supports Finding that Kostew Informed Estrada About the Campaign

Contrary to Estrada and Kostew's testimony, record evidence strongly indicates that they discussed the union campaign from early on. First, Kostew and Estrada have been in a romantic relationship since the beginning of 2017. Tr. 860:12-25. Although they both downplayed their relationship as of February or March 2018, stating that they were "just getting to know each other" or "still a new couple" at that time, they had already been dating for a year when the

campaign ignited and moved in together shortly after. Tr. 815:19-816:7; 860:19-22; 2481:11-24; 3106:9-20. Admittedly, they spoke to each other every day, outside of work, in February. Tr. 861:1-7. The ALJ should consider their apparent attempts to minimize the status of their relationship when weighing their credibility.

And if the nature of their relationship was insufficient, documents and faltering testimony show that Kostew and Estrada discussed the union efforts. First, on March 11, Kostew disclosed that Estrada warned her about the potential consequences of unionizing while instant messaging with Prieto. After Prieto looked for Kostew at the Saxe Theater (when Estrada threatened to put an end to the "union shit"), Kostew and Prieto started messaging each other through Facebook. Kostew said that she heard he was looking for her. Prieto responded, telling her that he was because he wanted to see how she was feeling about the "union thingy." GCX 58. Kostew responded, "I was all about it but I think I'm gonna tap out. Tommy [i.e., Estrada] said the other few times there have been union possibilities everyone involved was fired and I cannot afford to lose this job." GCX 58. Kostew initially denied that Estrada ever told her that employees had been fired for engaging in union activity or that she ever told anyone that Estrada said such things, but her message clearly tells another story.

After Kostew was confronted with a copy of her messages with Prieto, Kostew blurted out, "I forgot about this completely." Tr. 865:10-867:23. Then, when asked again whether Estrada ever told her about prior attempts to unionize, Kostew backtracked and said she did not remember, but also said that she may have heard that from someone else. Tr. 868:24-868:8. However, Kostew had no explanation for why she would tell Prieto that Estrada said it if he did not say it. Later, as Respondents' witness, Kostew testified that she did not know why she wrote it, but that it was possible Estrada told her that. Tr. 2962:6-13; 3019:14-3020:23. Notably,

Kostew's message to Prieto, discussed above, echoes a similar message she posted in the group chat at the outset of her argument with Hill on March 1. JTX 2 at 25; GCX 58. There would be no reason for Estrada to warn Kostew of prior attempts to unionize, if they were not discussing the current campaign.

Second, Kostew's testimony on why she did not tell Estrada about the campaign is contradicted by record evidence. Kostew testified that she did not tell Estrada about the campaign because she was told not to tell him and that she was under the impression that as part of management, he should not know. Tr. 861:11-17; 2960:4-14. However, after each time she gave that explanation, Kostew had no choice but to admit that she was actually told that she could tell Estrada about the campaign. Tr. 861:20-862:9; 3023:25-3024:20. In fact, on February 21, Kostew asked the group whether she should tell Estrada's sons about the campaign "because they could easily tell" him about it. JTX 2 at 6; Tr. 3024:21-3025:13. Answering her question, Divito posted four minutes later, "Tommy . . . can know." JTX 2 at 6. Even after that, the chat discussion shows that they did not consider Estrada part of management and on March 1, Divito announced that as a Stage Manager, Estrada could be included in the campaign. JTX 2 at 12, 24. Kostew was aware of these discussions. Tr. 861:20-862:9; 3025:12-3026:1. Thus, as early as February 21, Kostew had the green light to tell Estrada about the campaign, and her explanations as to why she chose not to tell him do not add up.

d. Respondents Actively View Surveillance Footage from Hundreds of Cameras within the Theaters

The record is replete with evidence showing that not only are there a lot of surveillance cameras around, but that Saxe, and likely others, actively monitor them. Below is a non-exhaustive summary of the record evidence in support.

Description of Record Evidence	Citation
Saxe testifying about how he saw Hill dancing and singing on surveillance footage	Tr. 3480:23-3483:25
Feb. 6 email from DeStefano implying certain areas ("hallway, parking garage") as being out of view	RX 28
Dec. 27 email from Saxe including picture from surveillance footage	GCX 102 at 1
DeStefano testifying about mobile phone application used to view surveillance footage, and how many feeds she can access (50).	Tr. 592:18-593:3.
Saxe testifying about watching employees talking and gossiping on stage	Tr. 3643:24-3645:1; RX88
Saxe testifying that some of the cameras capture audio, how there's hundreds of cameras, and who has access to the camera footage.	Tr. 80:4-84:10
Saxe testifying how he's seen Hill dancing.	Tr. 98:7-19
Saxe testifying how he saw Glick sitting on Glenn.	Tr. 170:5-22
Saxe testifying that he wanted to watch Urbanski on surveillance cameras, but couldn't see him anywere.	Tr. 243:6-249:7
Saxe testifying about watching performances from video surveillance footage, including live footage; how there's cameras backstage (where the cue caller is located during shows).	Tr. 254:11-24
DeStefano testifying to seeing Glick on camera constantly on her phone, sitting there and scrolling; DeStefano knew Saxe didn't want her there so she kind of tried to pay close attention.	Tr. 419:24-420:14
DeStefano testifying watching Tupy on camera sitting on a stool telling stories.	Tr. 473:23-474:20
DeStefano testifying about Saxe calling her about Turpy walking around with coffee and how she checked the cameras.	Tr. 588:23-592:17
DeStefano testifying about Saxe watching Tupy on surveillance.	Tr. 593:4-12
DeStefano testifying about locations of cameras in the theatres; who is responsible for the cameras; reasons for the cameras; how she's never done playbacks herself.	Tr. 593:13-602:20
DeStefano testifying about phone app.	Tr. 603:25-605:20
DeStefano testifying about Saxe calling her about seeing Tupy on camera; how Saxe watches the cameras in his office (part of his closing duties); Tupy with coffee at work.	Tr. 605:21-608:1
Lam testifying about audio console cameras.	Tr. 991:7-993:5
Hill testifying about cameras pointing towards backstage, tech kitchen, in the houses, in the booths.	Tr. 1035:20-1036:223
Hill testifying about Saxe watching her paint props and eating Brussels sprouts; DeStefano receiving a call from Saxe just as she arrived in the building	Tr. 1037:24-1038:22;
Hill testifying about worrying about being overheard because she felt like someone was watching.	Tr. 1039:25-1040:6.
Hill testifying about tech kitchen camera	Tr. 1092:1-22
Hill testifying about being observed eating Brussels sprouts; camera "was not a secret."	Tr. 1101:6-1102:2
Franco testifying about backstage security cameras; how he was	Tr. 1296:22-1299:10

discussing Union with current employee.	
Glick testifying to waving at a camera, and Saxe calling him about it.	Tr. 1364:12-1365:13
Glick testifying about discharge conversation with DeStefano, who something about watching camera footage.	Tr. 1371:15-1372:18; 1424:3-16
Glick testifying about cameras in the areas she worked (V1, V3, Saxe Theatre); negative impact on Union activity; how always being watched made her feel Saxe was a dictator.	Tr. 1379:23-1381:16; 1449:4-13
Glick testifying about unemployment file pictures of her standing and her belief that management watches them; hundreds of cameras.	Tr. 1406:8-140:1411:6
Leigh testifying about cameras in warehouse, in the welding area, seeing video stream in Saxe's office.	Tr. 1611:11-1612:21
Tupy testifying to taking the picture in CP1 "from inside the doorway" because there's no cameras there; location of cameras in the theatres; impact on his Union activity.	Tr. 1782:24-1790:22
TC testifying about pulling footage from IT	Tr. 2205:14-2208:1
Petty testifying about seeing screens in the IT room displaying various video and audio inputs.	Tr. 2411:6-2414:14
DeStefano testifying about Saxe watching Bohannon on camera fooling around.	Tr. 2766:17- 2769:9 ; GCX102
Carrigan testifying about Leigh on surveillance cameras; pictures of Leigh attached to PAFs.	Tr. 2910-10:2913:9; RX 64; RX 65.
Carrigan testifying about concern with Leigh blocking the cameras.	Tr. 2917:5- 2922:16 RX 69
Saxe testifying about being able to pull footage from surveillance cameras.	Tr. 3083:25-3084:19
Cuilla testifying about IT selecting best views of certain areas, reviewing video footage, reasons for pulling footage, audio quality,	Tr. 3353:1-3359:9; 3367:4-3373:7
Saxe testifying about seeing Hill dancing and singing in the tech room.	Tr. 3479: 20-3480: 3484:2 RX 90
Saxe testifying about his access to cameras.	Tr. 3498:18-3501:23
Saxe testifying about wanting QC to watch cameras; cameras tilting, GeoVision app, video retention, retrieving footage, practice of watching live footage.	Tr. 3632:1-3645:6; RX 98 at 2.
Saxe testifying about screenshot of surveillance footage he took on his iPhone, watching Hill on live footage.	Tr. 3659:22-3660:18 RX 90

2. Respondents Take Successive Steps to Quash the Campaign

a. March 13: Respondents' Stage Repair Project

On March 13, Respondents abruptly solicited employees to volunteer for a work call to repair the stage at the Saxe Theater, which had been in disrepair for quite some time. As

background, sometime in January or early February, Pendegraft initiated a work call for employees to "flip the stage." Tr. 485:11-20; 488:9-16; 1678:5-1679:15. Initially, the Stagehands flipped the stage by removing the boards that comprised the stage, flipping each board over, and reattaching the boards to the floor with screws. Tr. 485:21-486:14. Then, on about February 10, Pendegraft held another work call to fix the stage because the project was not complete and some boards were not screwed down all the way. Tr. 487:20-488:18; GCX 33. Graham continued to work on the stage, pulling up screws and fixing boards that had buckled up until the time he broke his arm on about February 21. Tr. 1679:5-15.

As of that same time, about February 21, when Pendegraft was fired, the stage was still far from perfect. DeStefano testified that the surface was uneven, and the entire surface of the stage "needed to be filled in, sanded down, and painted." Tr. 489:4-15. From this point, it is unclear whether any further repair work was done on the stage until March 13. According to Graham, on March 13, the stage did not look any different from the last time he saw it, noticing that the same boards were buckling that were on his list to fix before he broke his arm. Tr. 1680:2-6. As of February 27, Saxe was considering whether to use bondo on the stage as a filler to even out the surface. GCX 14; Tr. 495-497.

The record is clear though, that on March 13 all the Stage Managers attended a production meeting at the corporate office when it was decided to comprehensively fix the stage by filling it with bondo, sanding, and painting it that same night. Tr. 492:20-493:23; 494:12-21. Notably, Stage Managers do not usually attend production meetings. Tr. 494:22-495:12. In fact, Estrada has only attended one production meeting during his tenure. Tr. 809:14-18; 893:15:22; 900:2-12. Although Respondents' witnesses were not willing to admit that Estrada was at the March 13 meeting (Tr. 494:7-11; 809:17-810:10; 837:6-15; 815:13-18), irrefutable evidence

shows that Estrada was there. While Estrada was in the meeting, Kostew sent a group message using Facebook Messenger to some Stagehands that read: "Tommy's in a production meeting and asked me to send out a group text. . . . to anyone who wants to get hours and stay tonight and Bondo the stage, here's your heads up. David Saxe wants us to do that tonight so feel free to volunteer." GCX 59; Tr. 897:20-903:1; 907:14-21; 1459:14-1462:24. Kostew[20] confirmed that when she sent the message, Estrada was in the one and only production meeting he had ever attended. Tr. 900:2-12. She recalled receiving a call from Estrada, while he was in the meeting, who told her that Saxe wanted the project done that night and to send out the message to the Stagehands. Tr. 900:13-901:20. Although Estrada denied that the production meeting he attended was on the same day as the work call,[21] Estrada confirmed that Mecca[22] and Sojack also attended the only production meeting he ever attended. Tr. 3109:12-24; see also Tr. 3214:1-3215:20 (Sojack testifying that he attended a production meeting when painting the Saxe Theater stage was a topic).

Respondents' witnesses provided inconsistent testimony on why they decided to hold the extensive work call on March 13. DeStefano testified that "right after" Pendergraft left, she learned from Saxe that the Dance Captain complained about the stage because dancers were being dragged across an uneven stage. Tr. 491:5-492:10. Then, she explained that there was another failed attempt to fill the stage, possibly with a clear resin near the end of February. Tr.

[20] Kostew initially denied that (1) Estrada ever asked her to communicate with stagehands about the bondo project, (2) that Estrada ever told her that Saxe had anything to do with it, and (3) that she even assisted Estrada in getting volunteers for the work call. Tr. 896:19-897:14. It was not until being confronted GCX 59 that she admitted otherwise.

[21] Estrada explained that because it was such a big project, it wouldn't make sense that he attended the meeting on that day or that he started soliciting help on that same day, "because we've got to still get our stuff together and all before we start. You can't do it on the same day. It doesn't work that way." Tr. 815:7-816:3.

[22] Respondents' counsel did not elicit any testimony from Mecca about his knowledge related to the March 13 production meeting.

496:14-19. Then, while explaining why Saxe instructed her to order the March 13 work call, DeStefano initially testified that it was because "the captain went to him," explaining that the captain would not have gone directly to her because everyone was still unclear what her role was in Pendergraft's absence. Tr. 495:19-496:7.

As Respondents' witness, DeStefano had another explanation for the last-minute work call. She testified that while she was in the production meeting, the Dance CFaptain, Alejandro Domingo (Domingo) "just popped his head into [the meeting]" and explained that, although he was grateful for the prior attempt to fix the stage, it was still uneven. Tr. 2749:1-2750:3. As a result, they decided to use the bondo, sand it down, and paint the stage after. Tr. 2749:7-13. No one corroborated this testimony. Saxe testified that that he spoke with DeStefano after he "received info that the dancers were getting hurt and [the stage] was still bad." Tr. 3543:4-7. According to Saxe, DeStefano told him that she had a plan to fix the stage the following week and he said, "[A]re you kidding me; it's got to be done now. We can't have another person hurt." Tr. 3543:7-12. Saxe never testified whether this conversation occurred in a meeting, in-person, or over the telephone. As CGC's 611(c) witness, Saxe could not recall whether he was ever at a production meeting when they discussed using bondo on the stage, went so far as saying that he did not even know whether bondo was ever used on the stage, and did not even know whether the stage was painted in March. Tr. 102:15-104:6; 199:3-200:6. Rather unbelievably, Saxe testified that he was unaware of whether the stage still needed to be repaired. Tr. 201:6-8. Domingo, although a planned witness for Respondents, was not called to testify. Tr. 3579:10-15.

Regardless, the work call was held on the night of March 13 to fill, sand, and paint the stage. Stagehand Kevin Michaels (Michaels) learned of the work call when he arrived at work that day. DeStefano showed up shortly after he started working and asked him to help unload

buckets of paint from her car. DeStefano explained that they would be filling in holes on the stage and then painting over the floor boards. She had Michaels do a test run with the paint to see how quickly it dried. Tr. 1520:21-10. Shortly after, Estrada started informing the stagehands of the work call that night. Tr. 1521:11-13. Michaels stayed for part of the work call, but near midnight, he told Estrada that he had to leave because he "had something to do." Estrada responded by giving him a look. Michaels described the look as, "like he was kind of like surprised, sort of shocked. Like oh, you're going." Tr. 1521:14-1522:3. Michaels left and went to the union meeting.

Another stagehand informed Kostew that evening that he could not attend the work call. Chris Suapaia attended *Vegas! The Show* as an audience member with his wife on his day off that day. After the show, he spoke with Kostew, a friend of his, at the parking lot entrance for the Saxe Theater. He told her how it was great to see the show from the other side, instead of working it. Kostew asked if he was going to stick around for the work call. Suapaia told her that he couldn't. Tr. 1459:14-1460:17. Then, he got a ride with a co-worker to the union meeting. Tr. 1462:1-8.

b. <u>March 14: Respondents Increase Wages</u>

While employees were at the March 13 union meeting, Saxe authorized an unexpected wage increase for theater employees. On March 14, at 12:09 a.m. Saxe sent an email to his Payroll Manager that reads: "[P]lease pay the following people on THIS payroll (so their new rate went in last week) and TC will make the changes in the HR paperwork/ paycom." GCX 15. The email contains a list of various theater employees who were to receive a wage increase, mostly in the increment of two dollars an hour, but with some variance. GCX 15. Saxe could not explain why he sent the email that night. Tr. 215:2-7. Notably, in order for employees to be paid

retroactively as Saxe directed in his email, his payroll department only had a few hours to make all of the adjustments without suffering a penalty. Tr. 757:2-758:12; 761:6-762:3.

Respondents did not provide any evidence showing that the decision to increase wages was not made when Saxe sent his email to payroll. Even though Saxe adamantly denied making the decision on the night of the union meeting when he sent the email, he could not recall any other date that it could have happened. Tr. 215:2-216:24. Further, his explanation for why it had to have happened prior to sending the email was that "there's prep involved with submitting it to payroll." Tr. 215:21-216:4. However, Saxe's explanation is belied by the fact that payroll was given such little notice of the increase, as Carrigan explained. Tr. 757:2-758:12. Additionally, Carrigan's notations on the related personnel action forms indicate that the wage increases were implemented "per [Saxe's] email 3/14/18." GCX 97; Tr. 2245:10-2247:11; 2248:23-2249:7.

Various witnesses attempted to show that Respondents planned on increasing wages for months. In this regard, Carrigan testified that she knew there was going to be a wage increase (remarkably, as described in GCX 15), because she had conversations with former VP of Operations Karlo Pizarro (Pizarro) and Saxe since October and November 2017. Tr. 755:8-756:1. Saxe also testified, initially, that the implementation of the wage increase was being discussed as early as October or November 2017. Tr. 208:10-15. Carrigan described an ongoing project that would "stop and start, kind of." Tr. 2242:22-25; 755:23-756:15. She described the process as reviewing current wage rates and comparing them with industry standards. Tr. 755:23-756:21; 2240:10-2241:13. Notably, Pizarro had not worked for the company since about December 2017 or January 2018. Tr. 2240:12-20.

Saxe testified about the wage increase as Respondents' witness in an attempt to show that it was planned for some time. However, although he admitted that he was responsible for

authorizing the implementation of the wage increase, he failed to testify as to when he made the decision. When asked, "When exactly, if you can pick a point in time, was the decision made to increase the wages in March of 2018," Saxe responded, "For the production department? I remember having conversations about it in January with [Pendergraft]." Tr. 3495:4-11. Then, Saxe explained that the wage increase did not occur until March even though he was discussing it with Pendergraft in January because Pendergraft "wasn't doing it." Tr. 3495:12-16. So, after Pendergraft left, Saxe "wanted that done pretty quickly" as part of "the restructuring." Tr. 3495:12-21.

Saxe also provided some interesting details regarding what Pendergraft was failing to fix with regard to wages. Saxe testified that at some point he "discovered" that Pendergraft had given unauthorized wage increases to his friends, and that Saxe instructed him to "standardize it," but he never did. Tr. 3496:10-3497:15. Saxe later admitted that Hill and Divito were some of these "friends" being paid more, and that Pendergraft gave Hill an "unauthorized raise of a couple of dollars more." Tr. 3619:5-24. However, Saxe could not remember how he discovered this. Tr. 3619:25-3620:1.[23]

Further, Saxe's testimony on how he kept trying to get Pendergraft to fix the wage discrepancies does not withstand scrutiny. On cross-examination, Saxe testified that he was trying to get Pendergraft to fix the discrepancies at least by January, but "probably before this year." Tr. 3620:5-12. But then Saxe admitted that Pendergraft made a proposal to increase wages in January, but it was not authorized. Tr. 3620:17-22. So, on the one hand, Pendergraft was failing to fix the wage discrepancies that Saxe mysteriously discovered, but was also proposing to implement a wage increase which went unauthorized. Furthermore, although Saxe testified

[23] Notably, Hill and Kostew's Facebook feud centered on Hill getting paid more and Kostew complained about how she was waiting for a two dollar an hour wage increase.

that he kept trying to get Pendergraft to fix the wage discrepancies, he described his attempts at getting Pendergraft to comply as going over "generic stuff" such as "breaks and salary, wages and standardizing" during production meetings. Tr. 3620:13-16. Respondents did not produce any documents to show that Saxe made any attempts to get Pendegraft to increase or standardize wages.

Finally, evidence shows that at least as of March 4, Saxe was considering a completely different pay structure for theater employees, which undermines any testimony suggesting that the wage increase was planned for months or even weeks before Saxe sent his late night email. Saxe admitted that he posed an idea to DeStefano to pay the theater employees "per show" versus "per hour." Tr. 208:16-209:3. Saxe confirmed that DeStefano referenced this conversation within an email she sent to him on March 4. Tr. 209:5-23; GCX 13. He further confirmed that as of March 4, he was considering moving towards this pay structure.[24] Tr. 209:16-18; 647:24-648:14; *see also* GCX 98 (Saxe's "note to self" email reminding him "Change tech rates to per show" on February 23). Thus, Respondents' witnesses' testimony regarding when the decision was made to actually implement the wage increase is shaky, at best.

c. March 15: Respondents Decide to Discharge Employees, en Masse

On March 15, DeStefano laid the foundation to discharge eight theater employees, all of whom were either tied to the campaign, or Respondents would have reason to believe that they were. According to DeStefano, earlier in the day, on March 15, she met with Saxe to discuss discharging Glick, Suapaia, Franco, Bohannon, Langstaff, Michaels, Gasca, and Tupy, along with the reasons why. Tr. 471:11-473:7. DeStefano also met with Estrada either that day or the day before to discuss several of these employees. Tr. 472:6-22. After meeting with Saxe,

[24] Saxe later backtracked after he was questioned on when he made the decision to implement the March 14 hourly wage increase. Tr. 216:5-218:23.

DeStefano checked in with him via text message, letting him know that she would "get started on [the] emails" when she got home. GCX 3 at 2; Tr. 471-472. Two minutes later, DeStefano sent another message stating:

> I hope deciding not to bother you earlier didn't cost me your trust in me. I though it meant nothing. I promise you I have no clue or involvement. I love this job and respect you more than you know and I adore you as a boss. And I hope you can still trust me.

GCX 3 at 2. Then, within the hour, beginning at 11:26 p.m. that night, DeStefano sent Saxe a parade of emails melodramatically recounting each these employees' purported histories of poor attitude, workplace misconduct, and poor performance.[25] GCX 4; GCX 5; GCX 6; GCX 7; GCX 8; GCX 9; GCX 29; GCX 31. Respondents terminated Glick, Suapaia, Franco, Bohannon, Langstaff, and Gasca on March 18 and 19 and Michaels on April 2. And, although DeStefano never carried out the plan to discharge Tupy, she later cut his working hours and disciplined him as discussed below in Section III.G.

Respondents have given inconsistent explanations for this mass firing. In fact, Saxe denied that there was ever a point in time when he made the decision to actually discharge a group of employees in 2018. Tr. 190:12-16. According to Saxe, it is "an intricate question for each person when the decision was made." Tr. 188:2-7. Even after Saxe was shown an email he received from DeStefano on March 19, clearly describing how she "termed" Suapaia and Gasca, which ended with, "All 7 have been completed," Saxe could not say whether DeStefano was referencing the decision to discharge certain employees. Rather, Saxe resorted to saying that he did not remember ever reading the email before. Tr. 190:16-191:11; GCX 12.

Albeit, for his part, Saxe also testified that he and DeStefano compiled a "shit list" in January and decided to "term shitty employees." Tr. 130:11-131:16; 190:3-11. Saxe claimed that

[25] The purported reasons for each of these discharges are addressed below in Section III.D.3
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although it was not a physical list,[26] he and DeStefano talked about who they recommended to get rid of, noting that Estrada also had his recommendations.[27] Tr. 130:22-131:9; *see also* Tr. 88:23-93:22. Saxe mentioned Glick, Bohannon,[28] and Hill as being on the list.[29] Tr. 130:23-131:9. But, even though he and DeStefano had the authority to act on this list, Saxe waited because Pendergraft was "tasked with handling that and doing that and told to do certain things."[30] Tr. 259:5-15. Saxe claims he was "expecting [Pendergraft] to do it." Tr. 259:14-15.

Then, according to Saxe, right after Pendergraft was fired on about February 21, Saxe told DeStefano that she was taking over Pendergraft's responsibilities and discussed "enact[ing] the game plan" to "get rid of people" that they had previously spoke about. Tr. 3468:13-3469:5; 3472:5-17. Saxe described the game plan as "restructuring the department, meaning getting rid of the people who weren't good," training employees properly, "hold[ing] them accountable," and fixing "the pay structure." Tr. 3469:11-15; 3471:11-24. Saxe expounded, explaining there "was all kind of scumbags that they were bringing in, and [he and DeStefano] were going to get rid of all them." Tr. 3469:23-25. Saxe described the employees he wanted to get rid of as "criminals," "bad people," and "prostitutes." Tr. 3469:20-23. Notably, contrary to his testimony about the January "shit list," Saxe claimed that he did not associate specific employees in the group of "scumbags" he wanted to get rid of. Tr. 3663:15-3664:19.

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[26] Saxe was unsure at one point, saying that he "looked to see if there was [a physical list]." Tr. 131.

[27] Estrada testified that at some point, he gave DeStefano a hand-written list, including at least Langstaff and Michaels as employees that were "not helping out with the situation we have," meaning they were unsafe, "weren't there for us," and "weren't working hard. Tr. 791:1-793:14; 833:23-834:7.

[28] Notably, this would be prior to when Saxe claims he received a complaint cited by Respondents as a reason for Bohannon's discharge. See Section III.D.3.ii, below.

[29] When testifying about the shit list, Saxe appears to have let slip that he "discovered audio" in connection with it. Tr. 131:3-4. This could simply be an example of the evasive diatribes throughout his testimony, or likely a critical slip-up he quickly steered in a different direction.

[30] There is no evidence, aside from Saxe's self-serving testimony, that Pendergraft was ever "tasked" with terminating any of the employees who are discriminatees in this matter.

For her part, DeStefano testified that even though she met with Saxe on March 15 about the mass discharge, the decisions had already been made by that point for each of the employees. Tr. 4665:18-466:3; 471:11-473:7. Specifically, DeStefano testified that the decision to discharge Glick[31] had been made "for months"; that she decided to discharge Langstaff and Gasca in about January; that she decided to discharge Suapaia[32] and Michaels in February; and that the decisions to discharge Franco and Bohannon were made in March. Tr. 463:5-466:3. In an attempt to explain why these employees were not disciplined or discharged prior to March 15, DeStefano continuously claimed that Pendergraft did not allow her to anything. Tr. 324:9-12; 424:7-15; 481:2-11; 683:2-7; 2579:24-2580:115; 2775:8-16. At one point, DeStefano even claimed that because of Pendergraft, she "had to sneak around and verbally warn these people" instead. Tr. 2774:24-2775:7.

However, evidence suggests that DeStefano had the authority to discipline employees, and even acted on that authority, while Pendergraft was still employed. For example, on December 27, 2017, DeStefano created a written discipline for Bohannon for not following the schedule.[33] Tr. 2600:2- 2606:5 RX 36. In an obvious attempt to square this with her ongoing narrative of having her hands tied with regard to discipline, DeStefano initially claimed that this was "one of the very few write-ups that [she] was allowed to do" because she won an argument with Pendergraft. Tr. 2600:18-23; 2766:9-221; 2776:4-16. But her testimony was a complete fabrication. An email thread shows the entire circumstances surrounding the incident. Saxe saw Bohannon through video surveillance "doing absolutely nothing" while sitting near the audio

[31] DeStefano also testified that the decision was made in March, and also in November or December. Tr. 340:5-14.
[32] DeStefano also testified that the decision to discharge Suapaia was made in March. Tr. 354:16-20.

[33] Although Respondents' counsel stated that the relevance of the discipline was to establish Bohannon's documented performance issues (Tr. 2602:8-13), DeStefano clearly testified that the incident or the discipline had nothing to do with the decision to terminate Bohannon. Tr. 2766:5-16.

booth and inquired with Pendergraft and DeStefano about whether she was on the clock. GCX 102 at 1. Pendergraft noticed it was three minutes before her next start time and responded to Saxe and DeStefano, "She will be written up for not adhering to the schedule." GCX 102 at 2. Soon after, DeStefano responded for the first time, reiterating exactly what Pendergraft said.[34] GCX 102 at 3. After being confronted with the email thread, DeStefano confirmed that it was the conversation she had initially referred to, and later claimed that Pendergraft actually directed her to issue the discipline. Tr. 2768:20-2769:3; 2775:8-24.

Additional documents show that DeStefano disciplined and even discharged employees prior to Pendegraft's departure. On February 11, DeStefano informed Carrigan, Pendergraft, and others that she gave certain Stagehands verbal warnings for not taking a required break and that she sent the disciplines to Human Resources. GCX 33. Clearly, DeStefano did not "sneak around" behind Pendergraft's back issuing verbal warnings like these because she included him on the email notification. Records also show that DeStefano discharged a Wardrobe Technician on January 23, 2018 (RX 34 at 5; RX 29 at 6) and an Audio Technician on November 17, 2017. RX 37 at 12. Apparently, DeStefano was allowed to take these actions.

Furthermore, throughout her testimony, DeStefano raised the notion of "restructuring" just as Saxe did. However, initially, DeStefano explained that the impetus behind the plan to restructure was more efficient scheduling, not to get rid of the "scumbag" employees. Tr. 458:2-21; see also GCX 32 at 2.[35] As Respondents' witness, she claimed for the first time that, her plan to restructure was initially to discharge employees, but that after realizing she was never going to

[34] She also stuck up for Pendergraft, telling Saxe that Pendergraft had just reminded employees to stay busy when they are on work call. GCX 102 at 3.

[35] DeStefano gave a glimpse of what restructuring meant in a January 31 email to Carrigan. She explained how she wanted to drop some full-time employees to part-time, but that Pendergraft did not agree with what she planned to do. Notably, and contrary to DeStefano's testimony, she made clear in the email that she "in no way said anyone should be fired." GCX 32 at 2; Tr. 481:2-483:20. Notably, this incident occurred the day after DeStefano sent Carrigan what appears to be her plan to restructure. RX 29; Tr. 2579:24-2580:21.

"win the argument" with Pendergraft, she opted to simply propose moving some employees from full-time to part-time. Tr. 2579:25-2580:21; RX 29. Even so, DeStefano's testimony is still at odds with Saxe regarding the restructuring effort, as the motivation, according to her, was more efficient operations. Tr. 2579:12-19. Finally, further contradicting Saxe, DeStefano testified that she never provided any names to Saxe as far as who she thought should be discharged until after Pendergraft left. Tr. 478:15-481:1

As discussed at length above, Respondents' witnesses' testimony related to when the decisions to discharge the group of theater employees occurred, and why they apparently waited to act on the decisions, is inconsistent, contradictory on key points, and mired with falsehoods and exaggerations. Accordingly, the ALJ should find that DeStefano and Saxe decided to discharge Glick, Bohannon, Franco, Langstaff, Michaels, Gasca, Suapaia, and Tupy, at the same time, en masse, on March 15, as the record shows.

d. <u>March 21: Respondents Discharge Zach Graham</u>

On March 21, DeStefano discharged Graham via text message for "job abandonment." Tr. 1657:25-1658:5; 1664: 2-7; GCX 66 at 2-3. At 3:38 p.m., DeStefano asked Graham if he can get on Paycom. At 6:24 p.m., DeStefano then sharply switched her tone and rold Graham that she had "been trying you for weeks unsuccessfully through calls and texts." Fifteen minutes later, Graham refuted DeStefano's claims, stating that he had not "received any texts of calls from [her] except" for the March 21 text message. GCX 66 at 1. DeStefano then expanded her accusations that Graham had been ignoring her, claiming that Graham "did not respond to any of [her] repeated calls or text[sic]" for a month and that he had "termed a long time ago for job abandonment and failure to comply with the company policies & procedures." GCX at 3.

3. Respondents "Reasons" for Discharging Theater Employees

a. Spotlight Operator Jasmine Glick

The reasons provided for Glick's discharge, at various times, by DeStefano and Saxe, are innumerable. DeStefano discharged Glick, a Spotlight Operator, on March 18 over the phone. According to Glick's unwavering and corroborated testimony, DeStefano told her that they were "going in a different direction with things, doing some restructuring." Tr. 1372:2-11; 1383:2-9; 1424:3-7. Then, DeStefano mentioned something about somebody "watching camera footage" and policies not being enforced. Tr. 1372:10; 1383:8-11; 1424:-19. DeStefano also told her that the company would be hiring through someone else or a third party. Tr. 1372:7-11; 1424:8-10. See also JTX 2 at 34-35; Tr. 503:10-504:25. Confused by what DeStefano was saying, Glick asked if she was fired, and DeStefano confirmed that she was being let go. Tr. 1372:12-18; 1383:11-12. The conversation ended without DeStefano mentioning anything specific about Glick's performance.[36] Tr. 1372:5-18; 1383:11-20; 1424:11-19.

DeStefano's March 15 email, purportedly showing the reasons for Glick's discharge (Tr. 420:22-421:2), describes Glick as "a bit of a cancer around here with her attitude and mouth." GCX 4. DeStefano noted that she "constantly" hears about Glick "bad mouthing the company and people over her." Id. She also described how Glick has a habit of not being available for work calls. Additionally, DeStefano said that Glick was "lazy" and "on her phone" at work. DeStefano continued, saying that she did not have write-ups on Glick, but she was "concerned

[36] Although DeStefano testified that she mentioned Glick's cell phone policy violations and timeliness as reasons during the phone call (Tr. 503:10-17), the ALJ should discredit this testimony. Initially, DeStefano was less than forthcoming about the conversation and did not offer that she mentioned anything about a third party (Tr. 503:10-505:15). Further, she testified that she tried to "blanket" her conversation because she thought Glick would get defensive, indicating that she intended to generalize during the conversation. Tr. 503:8-12; 342:22-343:6. Finally, Glick posted on the group chat what she learned, and did not mention anything about cell phone use of tardiness. JTX 2 at 34-35. In fact, why would Glick immediately contact the head of lighting to find out why she was fired if DeStefano had actually told her specific reasons? Tr. 1372:19-24; JTX 2 at 34. For all those reasons, the ALJ should credit Glick's testimony.

that the shows are not [Glick's] priority here and her attitude is spreading to other employees." Id. Finally, DeStefano admitted that coverage was "tight," but she could manage, as she was "just looking out for the good of the company." Id.

Respondents' termination form documenting the reasons for Glick's discharge states that Glick "has a long history of insubordination [and] attitude. . . . [but] was never written up [and] always let off the hook for the awful things she has said and done. Her job performance was never putting shows first[.]" GCX 34 at 2. The "Termination Reason" identified is "violation of company policy and poor job performance." Id.

Saxe testified to an array of reasons for Glick's discharge. Saxe cited (1) attendance issues (Tr. 104:22-106:20); (2) hanging out in the Saxe Theater sometime in March not working[37] (Tr. 106:21-107:20); (3) performance issues, although he could not give any examples other than attendance related issues (Tr. 107:21-108:16; 108:22-23; 109:24-25); (4) "things she did to [Saxe] in the past" (Tr. 108:20-23; 110:10-13); (5) "immature behavior" (Tr. 108:24); (6) sitting on her boyfriend's lap[38] (Tr. 108:25); (7) "insubordination" by hanging out in the Saxe Theater on the clock (Tr. 108:5-19); (8) she was a no-call/ no show before she got rehired (Tr. 108:2-19); and (9) she should have never been rehired to begin with (Tr. 105:1-23; 108:20-109:7). Of all the reasons Saxe mentioned as CGC's first witness, he did not mention anything about Glick's cell phone use or the safety concerns DeStefano later cited.

DeStefano also testified as to the reasons for Glick's discharge. When asked about why Glick was discharged, DeStefano responded, "I would have to see what was actually on her PAF, but I know that it was her cell phone usage, her timeliness, her attendance, her violation of

[37] A possible nod to Glick's union activity because generally worked in the V Theater as far as Saxe knew. Tr. 104.

[38] This allegedly happened years ago, before Glick was rehired. Notably her boyfriend is a current employee, Darnell Glenn (Glenn). Tr. 168:18-172:7. Tupy mentioned that Saxe brought this up on about May 15 as a reason for Glick's discharge. Tr. 1752-1753.

policies and our standards of conduct." Tr. 341:4-9. When asked what she meant by Glick's "violation of our standards of conduct," DeStefano spouted off several things including attitude and "execution of shows." Tr. 341:10-18.

Later, DeStefano said the main reasons for Glick's discharge were attendance and cell phone use, but it was also her work ethic and performance. Then DeStefano said, "it may state attitude." Tr. 416:9-14. When pressed on why "it" would state attitude, DeStefano launched into a long-winded dramatic soliloquy that began with how Glick was "one of the rudest people" she ever met, and ended with an unrelated description of an alleged "safety issue" Glick caused that was dangerous. Tr. 416:15-418:13. When asked whether she would have documented such a serious issue, DeStefano reverted to her scapegoat, Pendergraft, saying that he "forbid her from doing anything. . . it was against everything under his opinion for me to have an opinion." R. 418:14-20. Then, DeStefano continued the performance of a lifetime, invoking the role of a captive held prisoner in the following exchange:

> Q: So you couldn't even write something down?
>
> A: Oh, no. I couldn't do anything. I did on one occasion write three people up because I'd had it. And he pulled me to the hallway, and it was a nightmare.
>
> Q: Like you could document an issue like that in other ways, right? Not just –
>
> A: I just remembered it. Like that was the only way I could until I had some freedom to do something. (Tr. 418:21-419:3)

To sum up the reasons Respondents provided for Glick's discharge: everything imaginable. Yet, the record does not contain any evidence supporting any of Saxe's or DeStefano's contentions that was not created after they decided to get rid of her. For her part, Glick readily admitted that she was late to work at times because she had car troubles at some point, and that she used her cell phone at times, but not regularly. Tr. 1424:20-1427:18; 1430:17-

1433:7. Glick was steadfast in her testimony that supervisors never singled her out to discuss her cell phone usage. Rather, Respondents sent email reminders to all the employees, indicating that Glick was not the only one who used her cell phone at work. Tr. 1426:22-1426:14. Notably, Glick was also ranked higher in terms of reliability and attitude than other lighting technicians by DeStefano as of February 6. GCX 83.

b. Audio Technician Taylor Bohannon

Respondents contend that Bohannon was discharged for ruining shows. Respondents claim they received several complaints about Bohannon's abilities as an Audio Technician. GCX 34 at 4. Saxe testified that the star of *The Mentalist* show, Gerry McCambridge (McCambridge), called him and told him that the tech crew was "ruining his show."[39] Tr. 111: 11-20. In a handwritten note purporting to summarize his conversation with McCambridge, Saxe claims that McCambridge told him that Bohannon "ruined his show." RX82. Saxe also claims that McCambridge told him that Bohannon was "so bad that he has to run his show now on PowerPoint". Tr. 111:14-17. Saxe, however, was unsure of when he received the complaint. Saxe testified that McCambridge complained about Bohannon in either February or early March, but could not give a definite answer. Tr. 111:11-25.

McCambridge did not corroborate Saxe's timeline, testimony, or note. McCambridge could not recall if his complaint call to Saxe was before or after Bohannon took an extended medical leave. Tr. 3155:2-9; 3156:5-11. McCambridge could not back up Saxe's claim that Bohannon "ruined his show." Tr. 3158: 8-18; 3161: 5-13; RX82. Rather, McCambridge told Bohannon via Instagram that she never "fuck[ed] up" his show "so badly that [he] needed to

[39] Respondents also claim that Saxe received complaints from Enoch Scott, star of the *Zombie Burlesque* show, and Wally Eastwood, star of *V – The Ultimate Variety Show*. Tr. 112:2-11. Respondents, however, did not call those individuals as witnesses and, besides self-serving testimony, have presented no non-hearsay testimony to support those purported complaints. Accordingly, none of the alleged statements that Saxe claims those individuals made should be given weight.

resort to the remote." RX81 at 4. McCambridge never told Bohannon that she ruined his show. Tr. 1212: 14-15.

Contradicting Saxe's claims, McCambridge also testified that "the show gets run by PowerPoint no matter what." In fact, McCambridge recalled his conversation with Saxe as a hypothetical scenario of having to run the show by himself, rather than having done so while Bohannon was in. Tr. 3161: 5-16. Respondents have presented no evidence that McCambridge ever ran his shows by himself while Bohannon was the Audio Technician for his performance.

Further, McCambridge testified that Bohannon was the type of Audio Technician who "knows what they're doing" as she "sits at the laptop" and "hit[s] the spacebar" when she is supposed to. Tr. 3144: 21-25; 3153:23-3155:1. On the other hand, when techs do not know what they are doing , McCambridge brings his remote on stage to "do it himself" and tells the Audio Technician to "sit there and do nothing. Tr. 3144: 23-25. Respondents have presented no evidence that McCambridge ever told Bohannon to sit and do nothing.

Moreover, Respondents' supervisors thought highly of Bohannon. As late as March 1, DeStefano, Respondents' front line supervisor overseeing Audio Technicians, thought that Bohannon was a "great audio tech". GCX 19 at 1; Tr. 330: 22-24. In fact, when Saxe told DeStefano that performers were complaining about Bohannon's performance, she emailed Saxe stating that she was "a little shocked because [she] had never heard that."[40] Tr. 331:1-19. Indeed, DeStefano thought that "it was a mistake." Tr. 2607: 5-14. DeStefano was also impressed with Bohannon's work ethic. Indeed, as late as March 4, DeStefano noted in an email to Saxe that Bohannon "uses her time to brush up and make sure she is on top of all her shows." GCX 13 at 3. None of above emails mention McCambridge.

[40] Indeed, when Saxe brought up Bohannon, DeStefano relayed that she had never received any complaints about her. Tr. 2606: 10-19.

By March 15, however, DeStefano's opinion of Bohannon strangely changes. DeStefano claims that she investigated Bohannon's performance and discovered that McCambridge had to use his remote to run his show when Bohannon was in. GC 6 at 1; Tr. 337:18-23. As discussed above, however, McCambridge admits that he never had to resort to using his remote when Bohannon was the Audio Technician for his show. Respondents have no corroboration for their self-serving claims that Bohannon "ruined shows."

Even after DeStefano apparently started looking into Bohannon's performance issues on March 15, she reported to Saxe that Bohannon was not "screwing up" but that her performance was average. GCX 6 at 1. Later, less than 12 hours later and within the succession of emails laying the groundwork to discharge all of the other suspected union agitators, DeStefano switched her tone and dramatically relayed to Saxe that the quality of the shows was "at risk" with Bohannon running audio. PX 57 (email sent at 11:55 p.m.).

Piling on "reasons" for Bohannon's discharge, Respondents also claim that Bohannon was "written up " for "messing around" and not being where she was supposed to be" and not following her schedule. Tr. 2600:3-24. DeStefano incredibly claims that she gave Bohannon a write up back in December 2017, "one of the very few write-ups that [she] was allowed to do" by Pendergraft. Tr. 2600: 14-24; RX 36. The document Respondents presented at the hearing, however, shows that the "warning" was not "delivered" and it has no signature line for an employee to sign. RX 36. It is also odd that the document DeStefano purportedly handed Bohannon to sign would have supervisory "Review History" included.[41] The document also inexplicably has a date stamp of May 16, 2018. RX 36 at 1. Besides DeStefano's self-serving testimony, there is no evidence that Respondents ever issued Bohannon any written discipline.

[41] DeStefano testified that the document she handed Bohannon looks exactly like RX36. Tr. 2603: 13-15. Bohannon denied receiving any written discipline. Tr. 1212: 16-19; 1239:17-1241:13.

When DeStefano called Bohannon to discharge her, DeStefano emphasized that Respondents were "restructuring" and that Respondents would be "replacing the technicians who were being let go with a third party." Tr. 1208:18-1210:5; 2609:20-2610:7. DeStefano did not mention McCambridge, performers' complaints, or ruining shows.

c. Audio Technician Nathaniel Franco

Franco was an Audio Technician, and one of the most outspoken participants on the Facebook group chat. DeStefano discharged him on March 18, just as she did with Glick. According to DeStefano, Franco had a history of messing up the audio for the shows. Most recently, Franco worked primarily in the Saxe Theater, running the audio for *Vegas! The Show*. DeStefano testified that the "final decision" to discharge Franco was made when Dance Captain Domingo and Company Manager Hardin sent an email describing how Franco played the wrong entrance music which "caused a scurry backstage." Tr. 346:7-23. DeStefano clearly testified she received that information from them via email *prior* to Franco's discharge, which was the "final straw." Tr. 344:4-14; 346:7-347:1; 348:20-349:2.

However, the only email in the record from Domingo and Hardin to DeStefano related to Franco was sent on May 23, months after Franco was discharged. GCX 20. Even after she was confronted with the post-dated email that appears to be the email she had so clearly referred to as the bedrock of Franco's discharge, DeStefano explained that she would "still ask for a statement" after Franco's discharge even if she already had the alleged prior email. Tr. 350:13-17. As noted earlier, Domingo was not called to testify. Hardin did testify, but Respondents failed to elicit any testimony as to whether he ever spoke with DeStefano about Franco's performance – by any means – prior to Franco's discharge. He simply gave his after-the-fact impression and opinion of Franco's performance. Tr. 3414:7-3419:15. None of Respondents' witnesses explained why

Hardin was solicited for the May 23 statement. At a minimum, Respondents' failure to corroborate DeStefano's critical testimony – that as a result of Hardin and Domingo complaining, Franco was discharged *when* he was – leads to the inference that DeStefano's testimony was less than forthcoming on this issue.

Moreover, even though DeStefano testified as Respondents' witness that she personally witnessed Franco's mistakes of playing the wrong announcements running the audio in the Saxe Theater and tried several times to help him correct his mistakes (Tr. 2653:16-2658:9), her own email detailing the reasons for his termination does not corroborate her testimony. Rather, DeStefano's initial email to Saxe on March 14 indicates that someone else was training Franco, and never mentions the events she testified formed the basis for her decision. GCX 29 at 1.

Regardless, just prior to Franco's termination, DeStefano provided a wholly separate reason for his discharge. On March 14, at 7:22 p.m., just hours *before* DeStefano sent Saxe the first email relaying concerns about Franco's performance (GCX 29), DeStefano sent Saxe a text message stating that they could discharge Franco the following Monday. GCX 10 at 2. The reason: "Just an elimination of position [be]cause [she didn't] need that swing anymore." GCX 10 at 2. Saxe replied: "I don't want to state eliminating position because we aren't doing that. He would be termed for sucking and screwing up the show." GCX 10 at 2. Doubling down, DeStefano answered, "We are eliminating because I don't need a swing audio for Saxe anymore since the current operators are absorbing. But either way works for me!" GCX 10 at 2. Following, Saxe provided a bit of a tutorial of how "Labor laws are very funny." GCX 10 at 3. Saxe explained that they could not eliminate a position and then hire someone for the position. GCX 10 at 3.

Notably, DeStefano initially denied ever presenting the "elimination of position" reason to Saxe, which is just one of countless examples of her lack of credibility. Tr. 453:20-25. Significantly though, DeStefano testified that, contrary to her text messages, she did "need a swing audio at Saxe [Theater]" at the time of Franco's discharge. Tr. 454:1-5. And, a swing Audio Technician was hired shortly after Franco was discharged. Tr. 456:14-457:10. However, even though she initially denied ever telling Saxe about the elimination of position, she tried to explain away the text messages and the hiring of Franco's apparent replacement by recounting supposed conversations with Saxe in which he enlightened her on how her plan to eliminate the swing position just wouldn't work. Tr. 455:14-456:13; 457:11-458:1.

When DeStefano discharged Franco over the phone on March 18, she simply told him that things were not working out. Tr. 1288:9-1289:5; JTX 2 at 32-33. Franco testified candidly about his performance. He admitted that there were times that he missed cues, and that he even experienced what he described as a disaster while working at the V2 Theater, on *The Mentalist*.[42] He explained that he screwed up, but that he had never even seen the show previously. Tr. 1346:20-1347:13. Records show that he started to train at the V2 Theater near the end of January. RX 29 at 4. Notably, Franco described how DeStefano discussed his performance with him about a week before he was discharged. She told him that the "vocals sounded great" when he ran *Vegas! The Show*.[43] Tr. 1294:3-23; 1348:1-5. Franco testified that he was getting incrementally better running *Vegas! The Show* prior to his discharge. Tr. 1347:20-25.

[42] This "disaster" was provided as a reason for his discharge, and notably, this is the show that Respondents claim Bohannon ruined, although the star of *The Mentalist* was unable to corroborate such a claim. See below.

[43] As Respondents' witness, DeStefano described how she gave Franco "compliment sandwiches," meaning that she would try to encourage him by including a compliment along with a criticism. Tr. 2653-2654. She testified to this after she admittedly reviewed prior transcripts of the hearing to an unknown degree.

d. Stagehand Chris S'uapaia

Respondents discharged stagehand Suapaia on March 19. The reasons DeStefano provided for the decision are remarkable. As background, Suapaia has physical limitations stemming from a 2015 accident. His mobility is impaired in that he is unable to stand for extended periods of time, and is unable to walk backwards, while carrying things such as props. Tr. 1465:5-16; 1467:5-9; 1468:5-11. When he worked with Stage Manager Sojack in late 2017, Sojack learned about Suapaia's physical limitations and accommodated him; he figured out a way to run the cues while having Suapaia move forward holding a different end of the prop. But after observing Suapaia limping at times, Sojack raised his concern with DeStefano and other supervisors during a Stage Manager meeting, about whether the particular shows at his theater, the V1 Theatre, given the physical nature of those shows, were the right fit for Suapaia. Shortly thereafter, Suapaia was transferred to work on a different show. Tr. 3200:8-3201:3; 3211:9-3213:2. Notably, when DeStefano fired Suapaia, she told him that one of the reasons was because Sojack told her that he was "unable to move backwards." Tr. 1464:6-10.

DeStefano also documented this reason, related to his physical disability, in her discharge documents. The termination form states that he "cannot do his job to the fullest extent. . . . We try and teach new tracks and he can't walk backwards and always has an excuse." GCX 34. Additionally, DeStefano's March 15 email to Saxe describes, in part, how he complained to Stage Managers at the V1 and V3 Theatres that "he has a bad knee" and "has a hard time doing things" because of it and "the fear of tripping again." GCX 5. Continuing, she states, "It's just getting harder and harder to adjust and deal with his . . . accommodations." GCX 5.

When testifying about the reasons she discharged Suapaia, DeStefano rambled about how it was "very restricted on what he could do," again referencing Suapaia's physical limitations.

Tr. 356:15-18. After letting slip that he was actually able to do everything working in Saxe Theater, she said, "[I]t just got to a point where I was like, it's a restriction every other day. You can't walk to the left. You don't want to walk to the right. You don't want to do this. You've got to be on this side of the stage" (referring to Suapaia) Tr. 355:18-23. Appearing exhausted herself, DeStefano continued, "[T]here's only so much I can do." Tr. 355:22-24. Finally, DeStefano mused, "It's a physical job, and he knew that upon hire. And I did accommodate him all I could until there became a point where this job may not be for [him]". Tr. 355:24-356:3. Throughout her testimony, DeStefano emphasized that she understood Suapaia's issue as a "fear of walking backwards," rather than an actual physical limitation. Tr. 356:13-357:12; 2703:17-2704:5.

As Respondents' witness, DeStefano described how after Suapaia was transferred to the Saxe Theater, he confirmed that he could run his track, but about a month later, started to complain about not being able to do it . So, *she* "tried to put him on a different track," but then he would complain about that. Tr. 2703:1-24. This, she said, amounted to an unwillingness to execute the shows, which is why she discharged him. Tr. 2702:22-2703:6. Notably, Estrada, the Stage Manager at the Saxe Theater, where Suapaia worked most recently, and since at least January 30, did not mention anything about Suapaia's ability to run his track and as far as he knew, did not have to make any accommodations on the track he ran. Tr. 800:1-18; RX 29 at 3. Moreover, Estrada testified that he did think Suapaia's track ever changed, because nothing had been told to him. Tr. 800:9-13. It is highly implausible that DeStefano, contrary to her testimony, would have anything to do with assigning tracks or that Estrada, as the Stage Manager, would be in the dark about who was running which track, or whether any changes were made to them.

Notwithstanding, DeStefano testified that Suapaia was also discharged because of his attendance, timeliness, and neglect of the schedule. In this regard, DeStefano testified that

Estrada told her that Suapaia called off work within the last couple of weeks of his employment because "he just didn't feel like coming in." Tr. 355:3-14. DeStefano referenced similar issues in her March 15 email and the termination form. GCX 5; GCX 34. She stated in her March 15 email that she did "some restructuring with positions" and because of his "availability, schedule, and fears" she did "not think he [was] a good fit for this company." GCX 5. As Respondents' witness, DeStefano described the reason for his discharge as stemming from his "shrinking availability." Tr. 2704:17-2705:13. Estrada confirmed that Suapaia requested time off and called off work at times, but that with regard to Suapaia's requests, he approved them "most of the time." Tr. 801:2-15.

According to Suapaia, DeStefano discharged him when he arrived to work on March 19. She told him that Human Resources was supposed to call him because he was being let go. Suapaia asked why, and she said that "well, we're going in a new direction and going with a whole outside staff." Tr. 1463:11-18. Suapaia asked if everyone was being let and whether his seniority had anything to do with it. DeStefano said that seniority had a place in it, and so Suapaia asked if Estrada's son would be sticking around because he had been there longer. DeStefano did not respond, and brushed him off by saying it was just the way "we decided to go forward." Tr. 1463:20-:1464:1. Unsatisfied, Suapaia started asking more questions. He asked her again, why he was being discharged. Then, consistent with all the other record evidence, DeStefano said, "I've heard from [Sojack] . . . that you're unable to move backwards during striking and set up for the show." Tr. 1464:2-10. Suapaia explained that he can do the show as long as he is able to move forward, but because of his leg he couldn't move backwards. DeStefano dismissed it, and said, "that's what [Sojack] said. If you can't do the job, then we can't use you." Tr. 1464:11-15.

DeStefano corroborated a large part of Suapaia's testimony, except for the discussion about not being able to walk backwards. In sum, DeStefano testified that she told Suapaia that the company was "restructuring, and that was why I had – we had been looking at people's performance and timeliness and things like that." Tr. 2708:4-9. She said that she explained that because of his shrinking availability, and that he had called off with "no, matter of fact, reason," she was letting him go. Tr. 2707:8-18. She also said that at some point the topic of seniority was brought up by Suapaia, but she breezed by it. Tr. 27086-16. Finally, DeStefano said that it had nothing to do with "insubordination or things like that, but it was his timeliness and availability and attendance and his work performance because he wasn't doing things like had always been doing and couldn't understand why." Tr. 2708:17-21.

e. Stagehand Alanzi Langstaff

Respondents initially claimed that Langstaff was discharged for timeliness, work ethic, attitude, poor job performance, and arguing with Stagehand Ivan Berrera (Berrera). GCX 7; 34 at 5. Respondents also contend that Langstaff was late 31 times from January 2 to March 12, and was a no call/no show.[44] RX 44.

At the hearing, Respondents piled on additional purported reasons for Langstaff's discharge. DeStefano exaggerated the alleged argument with Berrera i, claiming that Langstaff was bullying Berrera and that Estrada told her Langstaff is "like that to everybody" and was "abusive to everybody, verbally, just yelling and screaming, tossing things."[45] Tr. 370:23-

[44] Langstaff denied being a no call/no show. Langstaff's girlfriend called in for him while he was in the hospital. Tr. 1834:2-1835:24.

[45] Estrada did not corroborate DeStefano's exaggerations. Rather, Estrada, in response to leading questions by counsel, added more unsupported claims that Langstaff was not calling his cues on times, was talking to girls and the Audio Technician, was being everywhere he was not supposed to be, would wear slippers, and did not bring a flashlight to work. Tr. 3115:13-3117:9.

372:14. DeStefano also dumps more "examples" of Langstaff's purported misconduct, stating that he was "failing to put props away." Tr. 373:6-15.

Moreover, DeStefano melodramatically added that another reason for Langstaff's discharge was because Langstaff brought up his concerns about Kostew's promotion to Cue Caller and that she felt threatened because Langstaff was allegedly yelling at her. Tr. 375:16-376:22; 379:14-383:15. But DeStefano's own documents undermine DeStefano's version of this conversation. On March 15, DeStefano sent Saxe an email regarding Langstaff's purported misconduct, citing Langstaff bringing up concerns about Kostew's promotion to cue caller and arguing with Bererra. The email, however, does not mention "bullying," Langstaff yelling at her, or feeling threatened by Langstaff, even though Saxe instructed her to put her reasons for wanting to discharge Langstaff in writing. GCX 7; Tr. 375:16-376:22; 379:14-383:15.

Moreover, Saxe bizarrely testified that Langstaff was also discharged for getting into a fistfight, a wholly unsupported fabrication.[46] Tr. 125:21:126:25. In fact, none of Langstaff's incidents with Bererra ever escalated to physical contact between the two. Tr. 3284:3-3289:8; RX 85. Moreover, at the hearing Respondents concocted yet another falsehood regarding Berrerra. DeStefano claimed that Bererra was transferred to the day crew because Langstaff was bullying him. Tr. 635:6-14. Berrera, however, testified that while he requested to be transferred to the day crew in August 2017, he never brought up Langstaff's conduct towards him as a reason. Rather, Berrera told management that he merely wanted more hours. Tr. 3314:8-3316:4. And, after Bererra was re-transferred to work at the *Vegas! The Show* he never reported any concerns about Langstaff. Tr. 409: 2-9.

[46] DeStefano, after investigating the incident, did not recall hearing that Langstaff and Bererra got into a fist fight. Tr. 413: 13-414:4.

Respondents also claim that Langstaff was issued a written discipline for his attendance. Tr. 2659:15-2666:23; RX 45.[47] The document, however, has no signature line for an employee to sign. RX 45. It is also odd that the document DeStefano purportedly handed Langstaff to sign would have supervisory "Review History" included. The document also inexplicably has a date stamp of April 12, 2018. RX 45 at 1. Besides DeStefano's self-serving testimony, there is no evidence that Respondents ever issued Langstaff any written discipline.

On about March 18, Respondents discharged Langstaff. GCX 34 at 5. While Langstaff was in the car with his daughter, Carrigan called Langstaff to fire him. While on Bluetooth speaker, Carrigan told Langstaff that Respondents were letting him go "for a revamp in the department and restructuring the stagehands and brining in an outside source." Tr. 1836: 10-1837:8. Shocked at being discharged, about an hour later, Langstaff called DeStefano to get clarification. DeStafano fed Langstaff the same lines as Carrigan, that "there is a revamp going on" and that Respondents were "bringing in outside sources." Tr. 1837:12-23. Neither DeStefano nor Carrigan mentioned attendance, no call/no shows, poor job performance, laziness, bullying, fist fights, or incidents with Berrera. Similarly, Langstaff's termination form does not mention the Berrera incidents, bullying, fist fighting, revamping, bringing in outside sources, or the purported "no call/no show." GCX 34 at 5.

Even after Langstaff was discharged, Respondents kept grasping at straws, seeking to dig up more dirt about Langstaff's relationship with Bererra. Almost a month after firing Langstaff, DeStefano, after a conversation with Estrada, received an email from Kostew purporting to summarize an August 2017 incident with Berrera; neither corroborated Saxe's fistfight claims.

[47] The write up states that the next step would be a "final written warning." RX45 at 1. Respondents, however, have not presented evidence that Langstaff received a follow up written discipline prior to him being discharged.

Tr. 409:14-414:8; RX 27. Besides self-serving testimony by DeStefano and Saxe, there is no evidence that Langstaff's disagreements with Bererra escalated beyond words.

f. Stagehand Michael Gasca

DeStefano discharged stagehand Gasca on March 19. While Gasca was not involved with the union campaign, DeStefano and the Stage Managers had every reason to believe he was. As background, Gasca was hired in late 2016 and worked as a part-time Stagehand until about January 2018 when he changed to on-call. The change was the result of a compromise stemming from Gasca's request to take a one to two month leave of absence to pursue a union apprenticeship program. Initially, in about October 2017, Gasca spoke with Estrada about wanting to take about a month and a half off, from about January to mid-February, to pursue a Teamsters apprenticeship program. Estrada told him to write a letter explaining the time off and why he needed it. So, Gasca did and he left it in the tech room for Estrada and confirmed with him a few days later. Estrada said that he gave the letter to Pendergraft. Tr. 1145:1-12. After that, in about December, Gasca followed up with Pendergraft, who had not made a decision, but did not seem pleased about giving that much time off. Tr. 1146:13-1147:17.

Then, in late December, Gasca approached the Stage Managers to see if they had gotten anyone to cover his schedule. Estrada said that he had not gotten anyone to cover his shifts because he was still waiting to find out about the approval. Tr. 1147:18-1148:18. Then, in January, a woman, likely DeStefano, called Gasca and asked if he was coming back to work. She said she though he resigned, and he said that he never did, that he was just taking a leave of absence. Gasca could not recall what else was said during the conversation. Tr. 1149-1150.

Upset, Gasca went to the theaters to speak with Pendergraft in-person. Gasca told him about the phone call he received and asked why they were saying he resigned. Pendergraft

explained that they could not allow him to take a leave of absence, and rather, they would let him go and rehire him down the line. After discussing how he did not want to do that, Gasca offered another solution: he would come in for emergencies and work on-call. Tr. 1149:17-1151:16. From that point, Gasca worked on-call until he was discharged. Tr. 1152:5-17.

Estrada was not asked any questions about Gasca's request to take the leave of absence to pursue the apprenticeship program. With regard to Gasca, Respondents' counsel did not ask him any questions. Thus, all of Gasca's testimony related to the circumstances leading up to the on-call compromise, are in large part, undisputed. DeStefano testified about the circumstances surrounding Gasca's request for a leave of absence, but it is very difficult to decipher which, if any, of her testimony was grounded in personal knowledge. Tr. 424:23-440:9; 2700:2717:5. DeStefano's testimony also suggests at times that Gasca was either always an on-call stagehand, or at least was already on-call back in December, which conveniently supports one of the purported reasons for his discharge. Tr. 2709:9-12; 2716:9-17; 2718:1-6.

Gasca learned he was accepted to the union apprenticeship program sometime in early March, around March 9. When he learned, he went to the theaters to update the Stage Managers. Estrada congratulated him on his acceptance into the program. Then, he spoke with Sojack. During this conversation, Gasca explained that he would be starting classes for the program, which are unpaid, so he asked Sojack if he could start getting more hours at the theater. Sojack told him that DeStefano was doing the scheduling at the time and he should call her. Gasca stepped away and called DeStefano. He explained that he wanted some extra hours and she said that she would see what she could do. Tr. 1155:2-23. None of this is disputed in the record, unless DeStefano provided conflicting testimony about his request for more hours. However, his

request for more hours is corroborated by the statement DeStefano included in Gasca's personnel action form, which states, "Left 'on absence' and now wants hours." GCX 34.

The, on March 18, Gasca missed a call from DeStefano. Rather than call her back, he went to the theater to talk with her the next day. At that time, she discharged him. According to Gasca, DeStefano said she had called him to terminate him. Gasca asked her why, and she said that he was a bad worker, had a bad attitude, and that he had no experience backstage. DeStefano assured him that he was not the only one being fired.

DeStefano provides several reasons for Gasca's discharge in one in the slew of emails sent on March 15. DeStefano describes an incident dating back prior to January (likely related to the communications about his leave of absence request), stating that he approached her about not being able to work some shifts "because he had another opportunity" and would not be able to cover shifts anymore. GCX 9. The email continues, describing how she asked him to resign and he "lost it." GCX 9. Then, according to the email, Gasca called her, apologized for the misunderstanding, but said he "took another job and couldn't work for" Respondents, so she directed him to Pendergraft, who told him that they would work with him and put him on-call. GCX 9. Then, DeStefano recounted how she did not agree with the decision because Gasca has "one of the worst attitudes of anyone [she] ever worked with." GCX 9. With regard to attitude, she cited his constant complaining about pay, hours, and lack of appreciation. DeStefano also threw in how the Stage Managers at the V1 and V3 Theaters had complained about Gasca to Pendergraft because they were concerned Gasca would walk out on them. GCX 9. Summing up the reasons she wanted to get rid of him, DeStefano wrote that (1) she did not need on-call people anymore "since we fixed the structure," and (2) she could not "have that kind of behavior and attitude spreading and making other employees uncomfortable." GCX 9.

Regarding DeStefano's stated reason of eliminating on-calls, she attempted to show that she also discharged another on-call employee at the same time. Tr. 2717-2718. However, evidence shows that the other employee was not discharged (RX 55), and had not worked since before DeStefano started in her position in 2017. Tr. 432-435. At one point when asked who terminated the other employee, DeStefano testified, "I think I put in that paperwork. He had just never been there. I don't even know if he at that point still knew he was on our payroll." Tr. 435. Moreover, when she spoke with Saxe about all the employees before sending her March 15 emails, she specifically testified that she spoke with Saxe, initially, about eliminating on-call employees, but she discussed "getting rid of [Gasca]" Tr. 435:13-16. But then, it "turned into an on-call thing[.]" Tr. 435:13-20.

Gasca's termination form states: "Employee was an on call stage hand. He was used a handful of times with us and whenever he was in the building his attitude was awful and he was always complaining about hours/pay. Left 'on absence' and now wants hours. Messed up shows a lost as well." GCX 34. With regard to messing up shows, DeStefano recalled that there was a time that Gasca covered Mecca's shift and the show report was miles long indicating that Gasca made a lot of mistakes. The show report was never introduced. Further, Mecca and Sojack testified about Gasca's performance issues. However each testified that Gasca's performance did not change at any since he started working with them in 2016. Further, Mecca stated that it was not Gasca's performance that changed, but his attitude. Tr. 3181-3182; 3215-3216.

g. Stagehand Zachary Graham

Respondents contend that Graham was discharged for "job abandonment" and for not responding to management's inquiries about his condition. Tr. 1657:25-1658:5; 1664: 2-7; GCX 66 at 2-3; GCX 34 at 8. Respondents claim that DeStefano, after learning that Graham broke his

arm in late February, was unable to reach him for 20 days and was never given the "correct paperwork." Tr. 387:1-390:6; GC 11. However, Graham went down to the Saxe Theater and spoke with DeStefano in person on February 28. At the Saxe Theater, Graham first spoke with some of the Stagehands backstage about "the idea of unionizing," "pitched the benefits" of unionizing to Estrada, spoke with more Stagehands about unionizing, then found DeStefano to speak with her about FMLA. 1621: 2-1653: 11. Graham asked her about FMLA, but DeStefano reassured him not to worry ,and that he would have a job when he was healed. Tr. 1654: 2-12.

Graham also spoke directly with Estrada during this period. Graham pitched the Union to Estrada on February 28, and on March 13 to the meeting taking place that same night. Tr. 1652: 5-19; 1656: 18-24. Graham would also visit the Saxe Theater to help out. As admitted by Estrada, he would see Graham after he broke his arm, and Graham would give him pointers on fixing the stage. Tr. 3134:14-3126:5. Estrada claims that he tried calling Graham, but the last four digits of Estrada's phone number (9050) are not reflected in Graham's phone records.[48] Tr. 3123; 1-12; GCX 67; GCX 68. Estrada admits he did not send Graham any text messages. Tr. 3123: 13-14. Besides DeStefano's self-serving testimony, there is no evidence supporting her claim that Graham was unreachable. Tr. 1664:8-14; GCX 66 at 1.

Notably, DeStefano's own emails undermine any claim that Respondents were unaware of Graham's whereabouts or his medical condition. On February 26, DeStefano notes that she needed to check with Graham because she understood that he would need a full cast. GCX 22 at 2; Tr. 390:4-392:5. When DeStefano followed up with Graham on February 26, Graham emailed her two days later informing her of his upcoming surgery the upcoming Monday and a follow up appointment on the next Friday and attached his doctor's note. GCX 23 at 1.

[48] Graham's phone records corroborate his understanding that he did not have any missed calls or text messages from management. Graham kept the same phone number from February 24 to March 21. Tr. 1663:16-1664:1.

DeStefano claims that between February 28 and March 21, she never heard back from Graham. Tr. 396:16-397:3; 653:25-654:7; GCX 11; GCX 23. Nevertheless, on March 12 DeStefano notes on her payroll records that Graham was "out due to a broken arm + surgery this week." GCX 24 at. 1. DeStefano claims her March 12 email is "inaccurate" because she copied and pasted what she told payroll on a March 5 email. Tr. 399:1-402:5. Nevertheless, the language DeStefano claims she copied and pasted does not appear in the March 5 email, so there is no way she could have copied and pasted it. Tr. 654:11-655:13; GCX 53 at 1.

h. Stagehand Kevin Michaels

Long-term[49] stagehand Kevin Michaels (Michaels) was actually discharged on April 2, but Saxe and DeStefano made the decision to do so along with the others. According to DeStefano, it took a couple of weeks to train someone on Michaels' track at the Saxe Theater because it was a difficult one. Tr. 359-360. As Respondents' key witness, DeStefano testified as to her reasons for discharging Michaels. Firmly, DeStefano only provided one reason for the decision: "for neglecting to follow the schedule." Tr. 2616:23-2617:2. She explained that when she took over the scheduling in January, she made some changes to when the work calls were scheduled. When she noticed Michaels' did not follow the new schedule, Michaels explained how her scheduling was a problem given the show schedule. So, according to DeStefano, she changed the schedule again, but Michaels continued not to follow it, even though she claims she spoke with him on a weekly basis about it for over a month and a half. Tr. 2617:2-2618:12.

For his part, Michaels' corroborated some of DesStefano's testimony about the schedule. However, Michaels testified that he only had one conversation with DeStefano about it. He could not recall when it happened, but he mentioned to her that scheduling work calls before his shows was pointless because he could not get any work done when another show was running. Tr.

[49] Michaels was hired on August 15, 2015. GCX 34.

1566:16-1567:10; 1567:25-1568:8. Michaels explained that he was in regular contact with Estrada about his comings and goings, often discussing what had to be done in the theater for work calls, and followed a regular practice that began long prior. Tr. 1581. Michaels should be credited with regard to whether DeStefano spoke to him on a weekly basis about not following the schedule. Michaels was candid and consistent. When being cross-examined, he answered questions in a direct, forthright, accurate, and non-argumentative manner. On the other hand, the record is littered with DeStefano's exaggerations, contradictions, and fabrications. Moreover, Estrada's testimony, in large part, corroborates Michaels' testimony. Tr. 3127-3130.

Contrary to DeStefano's testimony as Respondents' witness, the record shows various other reasons Respondents relied upon in deciding to discharge Michaels. Initially, DeStefano testified about Michaels' attitude and how he refused to learn any other track but his own. Similarly, she wrote, "he only does one track and isn't really willing to learn more like the others," in her March 15 email to Saxe. GCX 8. DeStefano indicated that this information came from Estrada. GCX 8. This reason was echoed by Carrigan who was responsible for informing Michaels' of the decision. Michaels testified that he never refused to learn other tracks and actually suggested to Estrada that everyone, including himself, learn all the tracks for the *Beatles* show. Tr. 1570-1571. Estrada did not corroborate that Michaels was unwilling to learn other tracks.

In fact, Estrada testified that he was the one who recommended Michaels' termination, and for yet, other reasons, wholly unrelated to scheduling. Estrada said his recommendation was based on Michaels' attitude, that Michaels was "just very angry and missed a lot of things and not very helpful at all." Tr. 3121:1-7. Estrada continued, giving examples such as disputing whether a certain cue was part of his track, taking "months" to paint some stairs, and seeming

like he did not care anymore. Tr. 3121:8-17. Estrada quipped, "I don't know what happened to him." Tr. 3121:3-4. Later, Estrada claimed that these performance and attitude issues started in 2017 when he became the stage manager. Tr. 3127:4-22. Notably, in Estrada's initial testimony, he denied recommending Michaels' discharge, but admitted that Michaels was on a list that he gave to DeStefano. Tr. 790-791. Further, as of February 6, DeStefano ranked Michaels near the top of all stagehands in terms of attitude, reliability, how many tracks they knew.

Finally, although DeStefano testified that there was only the one reason for Michaels' discharge – failing to follow the schedule – Respondents' personnel form provides other reasons: "insubordination, poor work attitude, and poor work performance." GCX 34. And, DeStefano wrote in her March 15 email about Michaels, "I have a feeling this is 'just a job' to him and the attitude bleeds into the others down there. In trying to fix moral [*sic*], I can't have people being rude toward management and doing what they want." GCX 8. Evidencing that the email itself is a load of baloney, DeStefano concludes, "Unsure what to do regarding this if we should sit and talk or if it's a lost cause at this point." GCX 8. But, she had just met with Saxe! She sat and talked with Saxe earlier that day about all the issues that she later documented in the emails, including the one about Michaels. It is as if she wrote the email with the intent of creating a façade.

i. Lighting Technician Scott Tupy

Respondents decided to discharge lighting technician Scott Tupy (Tupy), along with the others, but ultimately did not discharge him. The reasons for his discharge are worth noting because so closely resemble the assortment of reasons DeStefano gives for all of the discriminatees' discharges the parade of emails she sent on March 15. Those emails reflect that DeStefano did not want to accommodate Tupy's need for a flexible schedule because of some

serious medical needs, and she also found fault with his constant talking and bad attitude and said she had to discharge him in order to "keep[] the integrity of our shows and the good attitudes of the other employees." GCX 31.

E. Organizing Activity at the Warehouse and its Consequence

1. Warehouse Technicians: Duties and Responsibilities

Warehouse Technicians' main duties involve welding, carpentry, and fabricating props and set pieces for shows. Tr. 1597: 14-17. Warehouse Technician also built offices and a stage at the Oquendo Facility. Tr. 1597: 6-17; 1626:10-24. Warehouse Technicians also perform maintenance and janitorial work, including mopping, taking out trash, cleaning bathrooms, stocking vending machines, painting, and building furniture at the Oquendo Facility. Tr. 1642:25-1643:14.

As of April 11, Respondents employed 8 Warehouse Technicians: Scott Leigh (Leigh), David Montelongo (Montelongo), Lamar Rayner (Rayner), Brandon Duran (Duran), Dwuane Thomas (Thomas), Marck Capella (Capella), Kendrick Dotson (Dotson), and Mario Stumpf (Stumpf). Tr. 2176:8-2177:18; 2255:7-12; Tr. 3907: 15-24. On April 13, Stumpf stopped working for Respondents. Tr. 3907:25-3908:2. Between April 13 and April 17, when Leigh was discharged, records show that the remaining 7 Warehouse Technicians were the only employees Respondents employed in that job classification. Leigh, the only welder among the Warehouse Technicians, mainly worked in the welding pit, and Capella and Montelongo mainly worked in the carpentry area. Tr. 1614:21-3; 1615:4-15. Warehouse Technicians mostly worked at the Oquendo Facility. Tr. 1623:4-7.

Warehouse Technician work together to complete projects, including building offices in connection with the remodeling of the Oquendo Facility, building a stage and the Oquendo

Facility, and building and repairing items for use at the theaters. Tr. 1615: 11-22. When the Warehouse Technicians built offices at the Oquendo Facility (a project that has been ongoing since Respondents moved into that facility), Capella and Montelongo built cabinets, and the other Warehouse Technicians installed boxes, cabinets, doors, and tables. Tr. 1615:23-1616:19; 2189:5-8. No employees other than Warehouse Technicians worked on this project. Tr. 2185:16-2189:8; 2189:16-2191:2. When the Warehouse Technicians built the stage at the Oquendo Facility, they worked together to construct the steel skeleton, lay down the wood floor, and set up rigging above the stage. Tr. 1623:9-17-1624:13; 1625:9-17; 1626:10-24; Tr. 3329:1-7.

Warehouse Technicians also work together on building and repairing items for use at the theaters. For example, they worked together on repairing props for a skit in the *Zombie Burlesque* show in which props tended to get damaged. Tr. 1619:18-1620:4. They also worked together on building "go-go boxes," giant, LED-lit steel and Plexiglas boxes on and inside of which performers dance in *Vegas! The Show*. Tr. 1620:1-1621:5. Warehouse Technicians also jointly work to work on set pieces, parts of the show that roll on and off stage to set a scene. Tr. 1621:10-19. Sometimes, Leigh also performs welding work on set pieces at the theaters with help from Thomas and Capella. Tr. 1622:2-1623:3. It is rare, however, for Warehouse Technicians to work at the theatres or for production employees to go to the Oquendo Facility, and, in instances where that has occurred, the work lasted, at most, for a stretch of 2 to 4 days, and Leigh brought and used his own tools. Tr. 1633:3-1634:13; 3821:3-20.

To be hired as a Warehouse Technician, an applicant does not need to have a college degree and need only be capable, able, and nice. Tr. 3558:22-3559:8.

Respondents provide Warehouse Technicians with tools, including a table saw, miter saw, chop saws, and welding machines, and personal protective equipment, including ear plugs,

respirators, dust mask, and gloves, for use in performing their work. Tr. 1616:24-1618:9. Warehouse Technicians are not required to wear uniforms. Tr. 1618:10-15; Tr. 3567:16-18.

For most work materials, Duran asks the other Warehouse Technicians what materials they needed, and they are purchased from Home Depot. For steel, Leigh gets approval from the purchasing department and then calls to order the steel from an outside vendor, and, for welding machine supplies, he requests supplies from Duran or Hunt. Tr. 1628: 5-14; 1634:14-1635.

Warehouse Technicians receive their work assignments from Saxe and Hunt and occasionally Carrigan. Tr. 1598:2-6; 1627:16-1628:4; 1628:15-23; 2164:18-2165:21; 2178:20-25; 2184:25-2185:14. Saxe and Hunt assign Warehouse Technicians work using a Smartsheet, a "to-do" list in a format similar to that of an Excel spreadsheet, which was posted in the back of the warehouse and could be picked up at the front desk. Tr. 1598:2-6; 1627:16-1628:4; 1628:15-1630:1; 2179:13-2180-5; GCX 85. Hunt also holds pre-shift meetings with Warehouse Technicians at the start of their shifts in which she updates them on the Smartsheet and raises any concerns or questions related to their work. 1630:2-1631:7 If a design issue arises, Warehouse Technicians are to speak directly with Saxe. Tr. 1635:4-9. All the Warehouse Technicians carry walkie-talkies to communicate with each other, to receive orders from the Office Manager, and to get called to meetings with Saxe. Tr. 1631:1-1632:22.

Saxe, Hunt, and Human Resources are involved in the hiring of Warehouse Technicians, determine their rates of pay, and handle disciplinary decisions for them. Tr. 3359: 9-14; 3562:8-18; 3565:17-19. Carrigan handles Warehouse Technicians' payroll and time off requests. Tr. 2174:18-2175:17. The Warehouse Technicians' managers, Human Resources, and payroll employees track Warehouse Technicians' attendance. Tr. 3565: 20-23.

All Warehouse Technicians work full-time, 8:30 a.m. to 5:00 p.m., Monday through Friday; use the same time clock in the break area at the Oquendo Facility; are paid hourly, between $13 to $20 per hour as of April 11; and are eligible for the same health, dental, vision, and life benefits. Tr. 1630:19-23; 2257:18-2258:6; 3562:2-7; 3563:9-12; 3566: 1-3.

2. The Electrician

Blake Scott (Scott), an Electrician at the Oquendo Facility, is not considered a Warehouse Technician. According to Saxe, Scott is only responsible for electrical work, and not warehouse work. Tr. 3808:18-25. During meetings, Saxe made it clear that Blake is an Electrician and he is only supposed to be doing only electrical work. Tr. 3809:22-3810:10. Saxe also said that Scott was the Electrician, wanted him doing electrician work, and jokingly said wants him getting electrocuted and not anyone else. Tr. 3821:25-3822:6.

Scott reports to Hunt and attends pre-shift meetings with Warehouse Technicians. Tr. 3829:24-3830:8. However, he does not work closely with Warehouse Technicians on their projects. For instance, he did not work with them when they were assigned to organize the warehouse, and, when they were assigned to build offices, his work was limited to replacing motion sensors that went out, adding light fixtures to offices that needed them, and adding electrical circuits for the lobby. Tr. 3810:11-14; 3810:20-3811:4. Moreover, Scott's day to day duties differed from those of the Warehouse Technicians. On the Smartsheet task list, Scott was exclusively assigned electrical work such as fixing a circuit, replacing a light, or checking a breaker. Tr. 3809:1-21.

3. Porters

Porters' duties greatly differ from those of Warehouse Technicians. Porters' main duties were to clean, vacuum, and sweep. They work at the V Theater Venue and Saxe Theater, *not the*

Oquendo facility. Tr. 3554:24-3555:19; 3798:23-3799:18. In performing their work, they use a "big" carpet cleaning machine, an upholstery steamer, and cleaning supplies, which they do not share with Warehouse Technicians. Tr. 3569: 3-7; 3648:24-3649:19. Porters also perform usher, bar back duties, and assembling VCards and nightclub passes. Tr. 3556:7:3557:1; 3799:19-3800:10.

Porters and Warehouse Technicians have little contact with each other. Porters do not work at the Oquendo Facility, and Warehouse Technicians do not work with them at the theaters. Tr. 3544:5-22; 3555:4-6; 3799:19-3800:10; 3819:19-24. Moreover, they have different recruiting, hiring, supervisory, and disciplinary structures. Saxe, the Theater Manager, and Human Resources are involved in the hiring process for Porters; Saxe and Theater Managers determine discipline for Porters; and Theater Managers, Human Resources and payroll maintain attendance records for Porters. Tr. 3359: 9-14; 3565:15-16; 3565: 24-25.

Porters have certain terms and conditions of employment that are distinct from those of Warehouse Technicians: they work varying shifts, and some of them work part-time; their pay, which is determined by Saxe, ranges from $10 to $17 per hour as of April 11; some of them work part-time; and they are required to wear uniforms. Tr. 3561:20-25; 3562:8-18; 3563:13-16; 3566:4-9; 3566:18-22; 3567:1-15.

4. Runners

Runners' duties also greatly differ from those of the Warehouse Technicians. Respondents' Runner during the relevant time period, Dominic Antonelli (Antonelli), was responsible for transporting items, such as tickets, ticket stock, show merchandise, cups, and t-shirts, between the Oquendo Facility and the theaters, as assigned by Hunt and Saxe. Tr. 3589:7-18; 3860: 25-3861: 25. Antonelli also picked up ordered and delivered groceries to the

Oquendo Facility. Tr. 3862:6-14. Antonelli used a van or a box truck to transport materials, depending on the size of the load. 3822:3-10.

Nobody every referred to Antonelli as a Warehouse Technician, nor did he ever see any paperwork referencing him as a Warehouse Technician. Tr. 362:17-23. Antonelli did not view himself as a Warehouse Technician because he did not do the same type of work as they did. Tr. 3862:23-3863:5. Antonelli did not operate machines at the warehouse and did not do the physical work that the Warehouse Technicians did. Tr. 3864:2-10.

Antonelli "never touched" the Oquendo facility stage. He merely picked up wood and steel that the Warehouse Technicians used for the project. Antonelli rarely unloaded the deliveries, only once or twice for the large scale project. Tr. 3882:14-3883:1; 3889:10-3890:1. Similarly, Antonelli did not assist the Warehouse Technicians with either renovating or building out the offices at the Oquendo Facility. Tr. 3883:2-17. Antonelli never did any cleaning around the warehouse. Tr. 3873:9-10.

Whatever physical work Antonelli did was minimal. A couple of times a month, Antonelli would grab gas tanks from the Oquendo facility, fill them up, and then return them to the warehouse. Tr. 3878:10-18. On the rare days that Antonelli would help Warehouse Technicians as an "extra set of hands", he would only do so for an hour a week. Tr. 3878:25-3879:16; 3885:24-3886:1.[50] Antonelli occasionally stocked vending machines. Tr. 3873:14-23. Antonelli minimally used tools. He did not operate drills, or saws, and did not carry a radio. On one occasion, Antonelli handed drills to the Warehouse Technicians. Tr. 3927:8-3829:9.

[50] Leigh never saw Antonelli perform work inside the warehouse or the Oquendo Facility. Tr. 3801:14-20. Antonelli did not assist Leigh in any of his projects, besides picking up materials. Tr. 3810:21-3802:21. Leigh did not see Antonelli help with a big organizing project at the warehouse. Tr. 3803:25-3804:15. Leigh did not interact with Antonelli besides picking up materials from Curtis Steel or Airgas. Tr. 3803:15-24. Antonelli would run to the theatre and come back with paperwork, pick up Home Depot orders and drop it off at the warehouse, pick up steel orders from Curtis Steel and bring the steel back to Leigh. Tr. 3800:12-3801:2. Leigh never saw Antonelli carry the same tools as he did (pocket knife, multi-tool, flashlight, or tape measure). Tr. 3803:6-14.

Antonelli's contact with the Warehouse Technicians was limited. Antonelli's days were "completely structured" around the runs. Tr. 3886:2-14. While Antonelli was doing "running" work, he was "not even present" at the Oquendo Facility. Tr. 3885:4-8. The Warehouse Technicians "spent all of their time" at the Oquendo Facility or at one of the theaters, while Antonelli "was always on the road." Tr. 3862:23-3863:10. Antonelli would spend about 75% of his time driving the company cargo van, while the remaining 25% was spent in a second floor office at the Oquendo Facility doing "video work" on a laptop for the marketing department. Tr. 3862:1-7; 3866:14-20; 3876:25-3877:17; 3880:4-3881:12; 3885:9-23. When Antonelli delivered items for the warehouse technicians, he would bring the truck around the backside of the building by the cargo doors, tell whoever was there that a delivery arrived, and walk through the warehouse to the offices, and Warehouse Technicians would unload the truck. Tr. 3281:21-3822:2; 3823:17-3825:8. When the Warehouse Technicians reorganized the warehouse in November 2017, Antonelli pitched in only for about an hour of what was an all-day project. Tr. 3865:4-14. Leigh saw Antonelli deliver some paint pans, handles, and rollers to the warehouse once in March and did not see him deliver any tools or equipment in April. Tr. 3822:11-20.

Unlike Warehouse Technicians, Antonelli was never present for a pre-shift meeting.[51] Rather, he would just pop in and out. He was not expected to attend as he received his assignments before or after the meetings. Tr. 3868:11-25. Antonelli received his assignments orally and in writing. Antonelli had access to the Smartsheets, and he received assignments from there. Tr. 3869:3870:8.

Antonelli earned $13.25 or $13.50 per hour, took his breaks in the office, used the front-desk radio instead of having his own, and was not required to wear a uniform. Tr. 3876:3-24; 3928:17-3929.

[51] Leigh testified that Antonelli did not attend the daily morning pre-shift meetings. 3802:22-3803-:5

5. Scott Leigh Solicits Support from Warehouse Technicians

Leigh was the only employee involved in organizing the Warehouse Technicians. About a week after Divito contacted Leigh via Facebook Messenger on about March 7, Leigh sought to solicit employees to join the Union. At first, Leigh talked to the Warehouse Technicians about they felt about unions in general. After getting a feel as to who would be interested, Leigh explained to them that the Union was trying to unionize the theater and was also looking to bring in the Warehouse Technicians. Leigh told the Warehouse Technicians that they would have a chance to upgrade their skills, would get fair bargaining, and would get a voice in what happens at work. Leigh discussed the Union with the Warehouse Technicians at the Oquendo Facility in the break area, near the time clock in area, and in the welding area. Tr. 1598:22-1601:14.

Soon after Leigh started organizing at the warehouse, Saxe became suspicious of him. About March 7, at Oquendo Facility theater, Leigh was asking Saxe about rigging points. Suddenly, Saxe asked Leigh about his "involvement with the Union." Leigh replied that yes, he had worked some gigs with them and liked working with the Union. Saxe then asked Leigh "what are the benefits to an employer with going union." Leigh replied that Saxe would be able to get skilled workers, such as temps to do rigging gigs, without having to hire them full time. Tr. 1603:1-1604:19.

Around April 9 or 10, Leigh met with Divito at Divito's house to get the union cards. He gave Divito a signed card and took the other cards and put them in his truck to bring to the Warehouse Technicians. Tr. 1605:4-15; GCX 65 at 1. Leigh then set out to have the cards filled out and signed by the Warehouse Technicians.

On April 10, Leigh successfully solicited Montelongo to sign a card in the parking lot at the Oquendo Facility. Tr. 1605:16-25; 3805:22-3806:20; 3807:1-11; 3813:21-3816:19; GCX 65

at 3. Although Montelongo denied filling out the card introduced into evidence at the trial and said it had incorrect contact information on it, Leigh handed Montelongo a blank card and saw Montelongo complete the card with a pen, using his steering wheel, and Montelongo identified the signature on the card in evidence as his signature and could not testify someone else filled out the card. Tr. 3243:7-3249:6; 3806:25; 3807:1-11; GCX 65 at 3; ALJX at 2. The same day, after clocking in to work, Leigh successfully solicited Rayner to sign a card and witnessed him completing and signing the card. Tr. 1606:8-14. GCX 65 at 4.

On April 11, while at the Oquendo Facility, Leigh obtained successfully solicited Duran to sign a card and witnessed him completing and signing the card. Tr. 1606:17-1607:5. The same day, in the welding area, Leigh solicited Thomas to sign a card. Leigh told Thomas that there was training classes available to help advance his skills, to progress in his craft. Thomas agreed to sign the card. Leigh gave him a card and witnessed him completing and signing it. Tr. 1607:7-19; 3816:20-3818:21. Leigh explicitly told Thomas that the card was a "union ballot card" saying that he was interested in joining the Union and helping the Union come into David Saxe Productions. Tr. 3807:12-24. Leigh also explained to Thomas that if he joined the Union and got in, there was training involved that could help him progress in his career. Tr. 3807:1-3808:4. Leigh and Thomas never discussed the Union again after this. Tr. 3808:5-12.

Thomas claims that, after speaking with Brass and his mother and doing a web search, he called an unspecified number for an unspecified business and spoke to an unspecified person about the card he signed. Tr. 3333:5-3337:10; Tr. 3338:19-3343:43. In response to Respondents' counsel's leading "question" telling Thomas "and then, and then you were sitting and then you went home" Thomas claims he went home.[52] Tr. 3335:14. At home, Thomas told his parents that

[52] As Thomas' timeline was supplied by Respondents counsel, it should not be credited.

he "got free training" that "my co-worker signed me up for free training, I signed the card." Thomas then tells them that he signed a "blue card." After being called an "idiot," Thomas researches by typing "warehouse" and "stagehand union" and an unspecified number popped up. Tr. 3335:14-3336:8. Thomas called the number "the next day because it was night time that day so it was probably closed. Tr. 3336:8-10. Thomas could not recall the phone number he called. Tr. 3346:14-22.[53]

Thomas initially spoke with an unspecified woman, who then transferred him to an unspecified "guy." Tr. 3346:23-334. Thomas told the guy "I signed a card" and that "it was blue." The guy asks Thomas for his name, and he says "hmm, I have your card right here." Thomas says "okay," then after the guy was trying to "persuade" Thomas, he says "I don't want my name on the card or anything like that." Tr. 3336:12-3337:10. Thomas told the guy that he "worked three jobs," to which the guy replied. "[Y]ou can make more money; you don't have to work as much. You only can work one job if you basically join the Union. You will make more money. You won't have to work as hard as you do." Thomas replied, "[N]o, no, no, take my name off the card, I don't want my card." After 5 minutes, the guy replied, "[O]kay, I'll take your name off." Tr. 3347:14-3348:3. Thomas never said he no longer wanted to join the Union or that he wanted his card back.

A few days later, on April 13, Saxe hunted down Leigh to grill him about his organizing activities. Shortly after Leigh clocked out and was walking towards his vehicle, Saxe asked Leigh to follow him into the gray conference room. In the gray conference room, Saxe asked Leigh if he "was signing up people for free union training." Leigh replied that "nothing in life is free." Saxe was displeased. He sighed and let Leigh go. Tr. 1609: 9-1610:-22. Saxe did not say

[53] Thomas "believed" the initials of the business name as "IATS" "I…A..T..S..S..S.. E" or "something like that." Tr. 3337:11-14; 3341: 3-14.

what his basis was for saying Leigh was signing people up for Union training.[54] Leigh then jumped into his vehicle and drove to the Union hall to meet with Divito. Tr. 1610:23-25. At the parking lot, Leigh handed the union cards to Divito. Tr. 1611:1-5.

6. Respondents "Reasons" for Discharging Leigh

On April 17, Respondents discharged Leigh. Hunt made the main decision to terminate Leigh. Tr. 2192:6-11. Leigh was discharged for "excessive tardies and absences." Tr. 2195:11-18. Carrigan claims that Leigh had been given multiple verbal warnings for tardiness and absences, and that anything more than two absences is excessive. Respondents cite attendance violations on "10/4", "10/20", 12/17", "1/3", "1/4", "1/24", "3/30", and "4/6". RX 67; RX 68; Tr. 2865:3-2866:3; Tr. 2867:23-25.

At the hearing, Carrigan splatters on reasons for Leigh's discharge. Carrigan testified that Leigh was "insubordinate and refusing to do work that was assigned to him." Tr. 2849:2-9; RX 63. Carrigan, however, has no personal knowledge of the tasks Leigh allegedly refused to perform. Tr. 2849:2-2850:2. Carrigan could not authenticate the handwriting purporting to show the tasks assigned to Leigh. Tr. 2850:23-2852:3; RX 63 at 3.

Carrigan also asserted that Leigh was written up for "being on his personal cell phone during work hours." Tr. 2852:14-21; RX 64. Outside of surveillance footage, no one personally witnessed Leigh being on his phone. Tr. 2913:1-4. Carrigan adds that Leigh was written up because "he still had not removed item from where [Saxe] had asked him." Tr. 2854:10-2860:12; RX 65. The personnel action form states that the "written" warning was "delivered," but

[54] Saxe denied that Leigh ever used the term "union training." Tr. 3493:5-7. Not employee witness testified that they told management about signing up for union training.

Carrigan could not testify that anyone delivered it to Leigh. Tr. 2913:11:2925:5. Notably, the form was finalized after Leigh was discharged.[55]

Carrigan continues, claiming that Leigh was written up yet again because he "left metal outside where it could be ruined." Carrigan, however, has no personal knowledge of the underlying allegation. Tr. 2860:16-3161:7; RX 66 at 1. Leigh never received written discipline for failing to bring inside items left outside. Tr. 1640:13-15. Carrigan also claims that she issued Leigh a "final warning" for failing to complete tasks, tardiness, and for not coming into work. Tr. 1638:2-10; 2175: 22-2176:7. Leigh, however, never received this purported final warning. Tr. 1638:2-15.

In sum, Carrigan did not witness Leigh receiving the write ups nor could she testify to having personal knowledge of the purported facts leading up to the write ups. Tr. 2913:11:2925:5.[56]

Saxe claims that Leigh was warned several times, was on final warning, missed a lot, had poor performance and attitude, and was insubordinate. Tr. 138:1-23. The "final straw" was then Leigh didn't show up for work again after being told to stop calling out. Tr. 138:24-139:3.

Regarding performance, Saxe claims that Leigh was refusing to do the tasks assigned to him, wasn't welding what he was supposed to be and kept training other people to weld, "wasn't there" and could not be found in the building, didn't want to work, was getting really weird, would "walk around and just be on his phone, doing nothing, just like on autopilot the last month maybe." Tr. 139:4-140:18.

[55] The form has an "Old Value" of "2018-4-17" for the "Effective Date" and then Hunt changes the date to "2018-04-16." RX65 at 2; Tr. 2913: 24-2915:13.

[56] Leigh denies that management ever sat down and had a conversation with him about his attendance, performance, completing tasks, being on his cell phone, or moving items from outside so they would not rust. Tr. 1639: 6-1640:12.

Dumping on reasons, Saxe claims that Leigh would "confront girls[57] at the front desk" and that the girls told him that Leigh was "abusive" and that they had "a real problem with this guy" and that he was "not a good guy and was doing bad things." Tr. 140:18:141:3. The abuse Saxe alleges was that Leigh was a "bad worker and like a jerk to them, said mean things to them." Tr. 141:15-18. Saxe contends that Leigh's "abusive" behavior had been brought to his attention 3 months before he was discharged. Tr. 141:19-24. None of the "girls", however, corroborated Saxe's claims.

Saxe claims that he spoke with Leigh on unspecified occasions about training people to weld. Tr.3489:15-3490:13. Saxe also claims that in early April he gave Leigh a "final notice" not to train others how to weld and to "get him minivinyls," but could not recall documenting the discipline. Tr. 3630:21-3631:25.

Saxe adds that near the end of Leigh's employment that "he was acting very weird and not working . . . like he was trying to get fired." Tr. 3490:13-15. Saxe then concocts another reason for discharging Leigh, that Leigh was "clocking in and leaving the property and working somewhere else or doing something else" and that other people were doing the welding who "didn't know what they were doing." Tr. 3490: 16-3491:20. Dramatically, Saxe claims that after seeing Rayner welding, he went looking Leigh everywhere in the building but could not find him, and that during the day other employees conspired to cover up for Leigh's absence by "sneaking him in." Tr. 3491:21-3492:12. After finding Leigh, Saxe "grabbed him and asked him where he was" and questioned his whereabouts. Leigh purportedly responded by smugly smiling "like he didn't care." Tr. 3492:4-3493:4.

At 8:27 a.m. on April 16, Saxe emailed Human Resources, "let's meet this morning to go over scott's infractions," to which TC replies 13 minutes later with "okay." GCX 87. Carrigan

[57] Saxe refers to Carrigan, Hunt, and the receptionist as the "girls." Tr. 141:10-15.

did "not remember meeting with him regarding Scott." Tr. 2198:9-2199:9. In a 9:13 a.m. email, Saxe expands his accusations against Leigh, adding that Leigh had "been avoiding working for quite some time now." GCX 88; Tr. 3492:13-3493:4.[58]

On April 17, at Carrigan's request, Hunt emailed Human Resources (Copying Saxe) "all the issues and concerns that she had" regarding Leigh, after Hunt had a "verbal conversation" with Carrigan, "so it would be documented." Tr. 2867:15-2869: 14. In the verbal conversation, neither Hunt nor Carrigan mention Leigh being abusive, a jerk, or saying mean things to them. Rather, during the conversation they discussed that Leigh "was insubordinate, he wasn't there, he wasn't showing up for work or he'd come in late, and wasn't being a team player." Tr. 2182:8-2195:14.

In the email, Hunt says that Leigh "refused to do any tasks assigned and seemed to just hide all day," that she "warned Scott on numerous occasions about being late, calling out, having a bad attitude and poor performance," that he was unreliable, lazy, and refused to do his job, had a "poor work ethic and flat out bad attitude," did not follow unspecified "company policies and procedures," "hides, is constantly on his phone, and simply put is a real jerk," and recommended that "he be termed." RX 69 at 1. Hunt does not mention Leigh being "abusive" to the "girls" in the email.

Around noon, after receiving the above email, Carrigan called Leigh to fire him. Carrigan told Leigh that his employment was terminated because he was "unreliable and had a poor attitude." Tr. 1612:22-1613:23. In her initial testimony, Carrigan claims that she told Leigh that Respondents were terminating his employment "due to his excessive tardies and absences." Tr. 2192:6-7. Her second time around, however, Carrigan testified that she told Leigh "due to his

[58] Saxe does not mention Leigh being "abusive" to the "girls." Carrigan did not remember meeting with Saxe in the time between the two emails (GCX 87 and GCX 88) were sent. Tr. 2201:1-25.

unreliability for showing up for work and his poor work performance, we were terminating his employment with the company." Tr. 2870:22-2871:17. What is clear, however, is that Carrigan did not mention Leigh being "abusive" to the "girls," being a "jerk" or saying "mean things to them," leaving items outside, being on his cell phone, hiding, or training people how to weld. Neither does Leigh's termination form. In the termination form, Respondents merely state that Leigh was terminated "due to his unreliability shown by his call outs, his poor job performance, and his bad attitude." RX 70.

F. Respondents' Reactions to the Union's Petition for Election

1. Respondents Relocate Notice and Time Clock

After the Union filed the petition for election in late April, Respondents posted the Notice of Petition inside the entry or foyer area of the managers' offices in the V Theater complex. As Prieto explained, the office area has several offices, mostly for front-of-house managers. There is an initial door that opens to room or foyer area where there is a copy machine. From there, there is another door that leads to the actual offices. Both doors are secured with a fingerprint entry system. Prieto had special access to the first foyer area because he requested to have it to collect the performers' checks that he delivers. Prieto testified that he only saw a copy of the Notice of Petition posted in the first area that he has special access to. Tr. 1947-1951.

About a week after the Notice of Petition was posted, Prieto noticed that the time clock that he primarily used was also relocated to the office area where the Notice of Petition was posted. Previously, the time clock had been outside of office area, near a main entrance. Once the time clock was moved, the door to the office area was unlocked. Notably, there are cameras in the office area, which is where the box office agents take and store the cash-outs. It is

questionable whether Saxe has cameras covering the previous location of the time clock because it was a main hallway used by the Miracle Mile Shops. Tr. 1947-1951.

Later, Prieto saw two copies of the Notice of Election posted in the V Theater Venue. One was posted where the Notice of Petition was posted, in the managers' office area. The other was on a corkboard near the backstage area, along with "vote no" propaganda. Tr. 1951.

2. Saxe Speaks with Employees About their Union Support

Leading up to the election, on May 15, employees attended mandatory meetings. The first was conducted by a consultant hired by Respondents to persuade employees to vote against union representation. During this meeting, Tupy was vocal, challenging the consultant on his talking points. The second meeting was conducted by Saxe, who encouraged employees to vote no in the upcoming election. Saxe recalled Tupy speaking up during this meeting. PX 32 8:21-14:22; PX 33 12:3-15:24.

After his meeting, Saxe walked around the theaters speaking with several employees, including Prieto. According to Prieto, Saxe told him that he heard that Prieto was a good worker and pro-union, and that he hoped that regardless of the election outcome, there was no rift between them. Then, Saxe asked Prieto whether he had ever tried to contact him about any issues. Prieto said that he had, indirectly, about his wages. Prieto explained that he had tried to get a raise by talking to the aerial act that he operates, so that they could talk with Saxe. Saxe told him that he had not heard anything like that. The conversation ended shortly after. Tr. 1953-1954.

Saxe's testimony on this incident, after potentially reviewing Prieto's testimony, is, frankly, ludicrous, but tends to corroborate Prieto's testimony. According to Saxe, before speaking with Prieto, he spoke with Vittorio Arata (Arata), a performer at the V1 Theater.

Allegedly, Arata told him that Prieto "was spouting off saying – talking shit about [Saxe] and saying he was going to get the Union in here and F[uck] [Saxe] up and stuff like that, and the guy's got a real attitude." Tr. 3536:2-12; 3621-3622. The inconceivable part is what Saxe said he did next. He said he spoke with Prieto right after and told him, among other things, that he "heard he's a good employee." Tr. 3537:23-3538:4 (no sarcasm detected). So, Saxe would have us believe that just after he learned that Prieto was going around saying he was going to "fuck him up," he commended what a good employee he was. Sure.

Regardless, Saxe admitted that when he approached Prieto, Saxe told him that he knew he was pro-union. Then he said he told him he heard he was a good employees and Prieto had nothing to worry about, that he's not being fired, and that all was good. Tr. 3537:23-3538:14.

Saxe also spoke with employees Glenn and Tupy while they were setting up for the show together that night in the V3 Theater. According to Tupy, Saxe approached and told him that "he knows he lost" them, and they should think about not voting for the Union because he has plans for the theaters. Saxe told them he was going to get new equipment, but that he there were a lot of things he wanted to say, but couldn't say because of the law. Tr. 1752. Then, Saxe told Glenn that he knew he lost him because he fired his girlfriend (Glick). Then, Saxe continued talking, directing the conversation at Glenn, saying something to the effect that Glenn should know why Glick was fired, "something to the effect of because there was affection between the two of them in the booth." Tr. 1753. Then, Saxe turned to Tupy, and Tupy said, "look, . . . I didn't start this whole union thing. . . I'm a union member, been a union member a long time." Tr. 1753. Then, Tupy told him that he was going to vote for the Union, because he's a union member, but then he also mentioned that he is a Republican who voted for Trump. Then, they laughed about it, with Saxe saying that he was talked into voting for Trump too. Tr. 1753.

Glenn similarly testified. According to Glenn, Saxe approached them and said, "I know you guys are both pro-union," and he wasn't going to hold that against them. Tupy responded that he knew Saxe was going to fire him because he's pro-union. Tr. 1901. Then, Saxe said he did not fire people for no reason. Then Saxe talked about another employee who was on his phone all the time, but Saxe said he could not fire him because of a "union freeze or something." He said he could not give raises, hire, or fire anyone. Then, Saxe said that he knew Glenn was pro-union because of his girlfriend, Glick. He followed up with saying that everyone has a choice and he would not fire them for being pro-union. Glenn also recalled, vaguely, Trump being brought up that led to Saxe bringing up the incident of Glick sitting on Glenn's lap in the booth.

Contrary to Tupy and Glenn, Saxe testified that Tupy initially raised his support for the Union. Then, according to Saxe, he shared that at one point he was also a union member. Saxe said he told them that there was no problem with being union. He was not mad, and he did not care. Later, he said that Glenn asked him about Glick, but that he told Glenn that he could not "breach HR" just because he was Glick's boyfriend. But, Saxe said he told Glenn that, "you know I've had issue in the past with your girlfriend." Tr. 3541.

The ALJ should credit Tupy and Glenn over Saxe. Both are current employees and answered non-leading questions to the best of their recollection with significant detail. Saxe, on the other hand, showed his propensity to exaggerate throughout.

3. DeStefano Sends Shuttle Bus Text Messages

The next day, on May 16, DeStefano sent out text messages to employees related to the election scheduled the next day. As background, Respondents provided a shuttle service for employees to use from its facility to the location of the election, the Board's Regional office.

DeStefano scheduled employees for a work call that day, even if it happened to be outside of their regular working hours, to come to the theaters and take the shuttle bus service to the election site. Tr. 557-559. For example, Tupy was scheduled to come in at 3:00 p.m., which is earlier than he typically begins work. He told her that he would not be able to make the work call, but even so, DeStefano texted him the day before the election confirming whether he was unavailable. Tupy asked what she needed, and she followed up stating, "just confirming you're doing as scheduled" (i.e., the scheduled work call to go to the election site). GCX 40; Tr. 558-560. Tupy responded, "I can also drive myself to the federal building if that is why I am to be in at 3… do you need me to clock in at 3 for work or for the bus?" GCX 40.

DeStefano also sent Glenn a text message on May 16 about the election. Her message reads: "Even though tomorrow is your day off, you can still catch a free round trip ride from PH to the NLRB offices downtown so that you all may vote. Meet at the V theater (V1) at noon or 3pm and a designated employee will lead you to the shuttle bus. Please let me know if you will be coming and to which time." GCX 41 (emphasis added); Tr. 560-561. According to DeStefano, Glenn "wasn't the only one that received that text." Tr. 561. At least one employee called DeStefano the morning of the election to let her know that he could not make it to the shuttle bus on time, but he would meet at the election site. Tr. 2789.

G. Respondents Single Out Union Supporters After the Election

1. Respondents Reduce Glenn and Tupy's Hours, and Discipline Tupy

On about June 1, DeStefano changed Glenn and Tupy's scheduled show call time. As background, they both work in V3 running audio and lights for *Zombie Burlesque*. Glenn is the audio technician and Tupy is the lighting technician. Up until June 1, they each reported for show call at 7:30 p.m. to set up their equipment. The sound check begins at 8:00 p.m. The doors

open for the audience at 8:15 p.m. Tr. 1760-1761; 1906-1907; GCX 72; GCX 48 at 6; GCX 49. There are certain things that each of them need to do before and after the sound check. For example, Tupy needs to check the functioning of all the lights and perform a video mapping of the dancers. Tr. 1762-1763. Before sound check, Glenn needs to check all the microphones, check all the wires and makes sure there isn't any static, and check the sound system. They work together to make sure the lighting system is integrated with the audio system. They also have to make changes to the show order depending on which dancers or specialty acts are in that night. Tr. 1907-1908.

Then, on June 1, shortly after the election, DeStefano changed the call time to 8:00 p.m. GCX 72; GCX 48 GCX 70. Glenn asked DeStefano why his schedule changed, and she told him via text message that "There was a restructure and everyone is coming in at certain times now." GCX 72. Glenn reminded her about the 8:00 p.m. sound check, but confirmed that he was to start "when sound check starts." GCX 72. Later, DeStefano changed Glenn's call time to 7:45 p.m. instead. They did not get extra time on the back end. Tr. 1908.

Tupy could not recall being informed of the 8:00 p.m. change, but regardless, continued to clock in at 7:30 p.m. throughout the first few weeks of June. Then, on June 20, DeStefano sent him a text message reminding him that as of June 1 he was supposed to clock in at 8:00 p.m., but that he kept clocking in at 7:30 p.m. She also informed him that he would be written up because of it. GCX 48 at 1 (2:22 pm). Tupy responded, "So I have 15 min[59] to check the rig for problems, bring up the projector and media server, video map adagio, and fix any issues?" GCX 48 at 2. DeStefano responded, saying that all of that is done for him. Then, Tupy explained that "turning on a breaker is not the same." GCX 48 at 2. DeStefano buckled at that point and said that if

[59] This is likely in reference to the 15 minutes between sound check and when the doors open.

mapping was the problem, he could come in at 7:45 p.m. instead. She also chastised him for not telling her why her scheduling was unworkable. GCX 48 at 2.

After her text conversation with Tupy, DeStefano sent an email to Carrigan and Saxe. She told them that after talking with Tupy, she changed his start time to 7:45 p.m., and sent them a copy of an updated schedule. DeStefano explained that no one ever told her that Tupy has to run the video mapping and coming in at 8:00 p.m. does not give him enough time. GCX 49 (2:46 pm). Then, a couple of hours later, DeStefano sent an email to Human Resources with the subject line, "For the record for Raymond 'Scott' Tupy."GCX 47 (4:10 pm). The email begins, "For the record, Scott Tupy is still clocking in 30 minutes early after I told him time and time again not to." GCX 47. Then, DeStefano noted that she was waiting for Saxe to send her the specific wording for Tupy's write-up. She goes on to state that Tupy's "in time is 8pm." Interestingly, DeStefano's "for the record" email does not mention anything about how she revised her schedule or the start time, based on her conversation with Tupy. GCX 47.

Later that night, Mecca delivered a written warning to Tupy for clocking in at 7:30 p.m. on several occasions in in June. GCX 70; GCX 51. The personnel action form generally states the reason as "Policy Violations/Substandard Job Performance"[60] and also provides a narrative. GCX 70. Mecca reported back to DeStefano that he delivered the write-up and described Tupy's reaction. GCX 51. Mecca also wrote, "Had a big attitude. Well he has it now." GCX 51.

DeStefano's initial testimony regarding this timeline of events is not supported by the documentary evidence cited above, throughout. Tr. 589-592; 608-614. In sum, DeStefano testified that prior to June 1, she changed Tupy's start time to 8:00 p.m., but he kept showing up around 6:00 or 7:00 p.m. Then, after talking with Tupy sometime around June 1, she changed his

[60] Ironically, Tupy was disciplined for "substandard job performance," but it was DeStefano who admittedly created an unworkable schedule.

start time to 7:45 p.m. She wanted to write him up ever since then, when there was incident involving coffee that Saxe discovered through the surveillance system, but had to wait until Saxe gave her the correct wording for the personnel action form, but, when he didn't, she issued one anyways with the help from Carrigan.

2. Respondents Target Trouble Maker Urbanski

Stephen Urbanski (Urbanski) worked as a lighting technician, performing maintenance on lighting equipment outside of show times. As discussed below, after he observed the election on behalf of the Union on May 17, Respondents stopped following up with him about returning to work on modified duty, and put him under Saxe's thumb when he finally returned to work. Most of the events are not disputed, as they are documented in contemporaneous written communications.

Urbanski injured his hand at work in early April. Then, about mid-April, he reported to the Oquendo Facility to meeting with Carrigan about working on modified duty and to sign paperwork. While meeting with Carrigan, Urbanksi asked for clarification on what his duties would be if he started on light duty. Carrigan called Saxe to her office. Saxe arrived and explained. Urbanski asked if there would be consequences if he turned it down. Saxe told Urbanski that there were no consequences, and that he preferred if Urbanksi declined the light duty because then Saxe would not have to pay him. Urbanski signed some paper and went with Saxe to his office to go over what needed to be done in the warehouse in terms of some inventory tasks that he wanted Urbanski to work on.[61] Urbanski continued to work on light duty for a short period, but after Saxe criticized his work ethic, Urbanski told him that it would be better if he returned to work after his April 30 surgery. Tr. 2268-2274; 2281-2284.

[61] According to Urbanski, Saxe also discussed missing equipment he thought was stolen by Pendergraft, that Pendergraft had "hookers" on the payroll, that Karlo Pizzaro was fired for stealing, and that he knew Divito was Urbanski's roommate Tr. 2271-2272. .

After that, Urbanski kept in contact with Carrigan about his progress, with Carrigan informing him when she received updated medical progress reports. She also offered him modified duty at those times. However, Carrigan's tone changed just days before the election, and eventually she stopped offering him modified duty altogether. For example, from May 3 through May 10, Carrigan explained that she got updated medical progress reports with certain restrictions related to Urbanski's progress. In those messages, she made an offer to accommodate the restrictions, and explained that it was up to him whether he accepted or declined (echoing his earlier conversation with Saxe). The last time she sent an email of this nature was on May 10. Urbanksi responded on May 11, saying that he was going to "decline as of now," because of his injury, and he also noted that he may wait until he's fully recovered to come back. Then, on May 14, Carrigan sent a message seeking confirmation that he was declining, and threatened to take disciplinary action up to termination. GCX 89.

From there, there is a lot of back and forth between them about whether Respondents were requiring him to return why Carrigan was suddenly saying that he had to work while injured when that wasn't the case initially. Then, on May 24, Urbanski told Carrigan that he went to the doctor and should have different restrictions in place on June 4, would return to work on light duty at that time. With no response from Carrigan, Urbanski requested modified duty paperwork on June 1. GCX 89. The next time Carrigan contacted Urbanski was on June 19 via email, when she claimed that she was still waiting on paperwork showing that he was released for full duty because, according to her, he stated that he was only going to return on full duty. She also chastised him for alleged misconduct when he initially performed light duty an accused him of not wanting to work. GCX 90.

Then, on June 22 Carrigan informed Urbanski that she received a progress report releasing him for full duty. GCX 91. However, Urbanksi did not actually return to work until July 8, as records show that Respondents attempted to have him return to work at the Oquendo facility instead of the theaters where he had worked previously, and Urbanski protested the different location and hours that Respondents were imposing. GCX 91; GCX 92; GCX 93; GCX 94; GCX 95. Just prior to returning to work on July 8, Respondents actually discharged him sometime before July 3. GCX 96.

Finally, on July 8, Urbanksi returned to work, on full duty, at the theaters. But he was in for a big surprise when he got there. DeStefano, who was traveling on vacation, sent Urbanski an email the night before providing an extremely detailed task list. GCX 42. Throughout the day, DeStefano kept checking in with Urbanski about where he was at on his task list, because Saxe was asking her throughout the day to get an update so he knew what Urbanski was doing. GCX 43; GCX 37. Then, the next day, Saxe started directly supervising Urbanski, haranguing him by email excessively. He also instructed Urbanski not to perform any tasks unless the tasks were assigned to him, in writing, by either DeStefano or Saxe. GCX 100 at 5. Through July 11, Saxe was in constant communication with Urbanski about little things and went so far as to make Urbanski respond, line by line, to his emails to him. GCX 101.

Notably, prior to his injury, Urbanski worked independently. He would review the show reports from the night before and determine what lighting equipment he should fix. This was no longer an option with Saxe breathing down his neck. Tr. 2383.

IV. LEGAL ANALYSIS

A. Mecca and Sojack are Supervisors Under Section 2(11) of the Act

1. Legal Standard

Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the Board will find individuals to be supervisors if:

(1) they hold the authority to engage in any 1 of the 12 supervisory functions… listed in Section 2(11);

(2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and

(3) their authority is held "in the interest of the employer."

Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

Individuals will be found to possess supervisory authority if they can independently take any of the actions enumerated in Section 2(11) of the Act, or if they can effectively recommend such actions. *Oakwood Healthcare, Inc.*, 348 NLRB at 687. The Board considers individuals' authority to recommend actions to be effective if the recommendations are usually followed without independent investigation by a superior. *DirecTV*, 357 NLRB 1747, 1749 (2011), citing *Children's Farm Home*, 324 NLRB 61, 61 (1997).

2. Analysis

The evidence establishes that Sojack and Mecca effectively recommend the discipline of employees and are therefore statutory supervisors. DeStefano testified that Sojack and Mecca,

just like admitted supervisor Estrada, are her "eyes and ears" and that she "expect[s] them to look at policies and procedures" the way she does. Moreover, DeStefano gives great weight to the recommendations of Sojack and Mecca concerning discipline, and generally, except in "weird extraneous" circumstances, follows their recommendations.

Moreover, the evidence establishes that Sojack and Mecca assign and direct employees' work. Sojack makes the schedules for employees at the V1 Theater, thus assigning employees to particular shifts. He also developed and updates the cue sheets for the theater and assigns employees particular sheets. In addition, during the shows, Both Sojack and Mecca independently make adjustments, including by substituting entire acts, and give employees direction to perform the tasks that must be performed to accomplish the adjustments.

Additionally, the evidence establishes that Sojack has the authority to effectively recommend transfers of employees, as the record reflects that Sojack recommended that Suapaia be transferred to a theater with less physical work, due to Suapaia's physical limitations, and Respondents complied with his recommendation.

Secondary indicia also supports finding Sojack and Mecca to be statutory supervisors. Both Sojack and Mecca attend Stage Manager meetings. Both of them also use headsets to communicate directions to employees. In addition, employees, including Supaia, view Stage Managers as supervisors.

In sum, the evidence establishes that both Sojack and Mecca are statutory supervisors.

B. Respondents' Handbook Rules Interfere with Employees' Section 7 Rights

1. Respondents' Email and Communications Activities Rule

In *Republic Aviation v. NLRB*, recognizing the adjustment the Board must make "between the undisputed right of self-organization assured to employees under the Wagner Act

and the equally undisputed right of employers to maintain discipline in their establishments," the Supreme Court sanctioned the Board's adoption of presumptions that rules against solicitation on an employer's property during non-working time and against wearing union insignia at work are unlawful. 324 U.S. 793, 797-804 (1945). Extending this principle to the contemporary workplace, where employees' presence in the workplace is often electronic, and not physical, the Board, in *Purple Communications, Inc.*, adopted a presumption that employees who have access to an employer's email system have a right to use that system to engage in Section 7 activities during non-working time, absent a showing of special circumstances. *Purple Communications, Inc.*, 361 NLRB 1050, 1063 (2014). Moreover, even setting aside this right, the Board has held that it is unlawful for employers maintain rules that, when reasonably interpreted, interfere with or prohibit the exercise of Section 7 rights, absent a countervailing business interest outweighing the rule's adverse impact. *The Boeing Company*, 365 NLRB No. 154, slip op. at 3 (2017).

Here, Respondents maintain an Email and Communications Activities rule that prohibits "[c]ustomized signature lines containing personalized quotes, personal agendas, solicitations, etc." and permits only "information pertaining to name, job title, and contact information" in signature lines. Thus rule directly interferes with the ability of employees to display union insignia or messages supporting an organizing campaign or other concerted activities in their email signature lines. In the contemporary workplace, where, as the Board acknowledged in *Purple Communications*, employees' presence in the workplace is so often electronic, and not physical, an email signature line can serve as the modern-day equivalent of a union button, conveying union support wherever the employee appears.

To the extent the rule applies to employees' communications during non-working time, it interferes with the right of employees, under *Purple Communications*, to engage in Section 7

activities (via their email signature lines) during non-working time. Moreover, the rule appears in a policy that, on its face, allows employees' personal use of email, so long as it is not "excessive." GCX 99 at 27, 75. Thus, regardless of any presumptive right to use Respondents' email system, the rule is discriminatory, in that it allows employees to engage in any manner of personal communications, but does not allow the display of messages or insignia, including protected ones, in email signature lines. Moreover, unlike other email communications and in-person solicitations, the inclusion of insignia or messages in email signature lines does not require the use of working time. An employee could create a signature line displaying a union insignia or protected message during non-working time, and the line would be stamped on the employee's emails during working time without the use of any of the employee's time. Thus, applying the rationale described in *Republic Aviation*, the display of insignia or a protected message in a the signature line functions more like a the wearing of a button at work (presumptively protected at any time since it does not interfere with business operations) than a solicitation (presumptively protected only during non-working time since it could otherwise interfere with work).

Although Respondents may assert that the display of protected insignia or messages in a signature line could interfere with business interests by creating the appearance that Respondents are sanctioning the insignia or message, email signature lines containing personal insignia, messages, and quotations intended to express something about the identity or views of the sender are so common that email recipients would certainly understand that the message is from the sender and not from Respondents. Moreover, this asserted business interest could be addressed by a rule more narrowly tailored to prohibit unauthorized statements on Respondents' behalf. In addition, although Respondents' may assert a business interest in encouraging thoughtful and

concise communications, this clerical concern does not outweigh of the interest of employees to display insignia or messages that, like union buttons, in a momentary glance, can be viewed or ignored.

In sum, Respondents' Email and Communications Activities rule is unlawful because it interferes with the right of employees to display union insignia or other protected messages in their email signature lines, and Respondents have not asserted any special circumstances justifying its maintenance or any business interests outweighing its Section 7 impact.

2. Respondents' Blogging Rule

As outlined above, the Board has held that it is unlawful for employers maintain rules that, when reasonably interpreted, interfere with or prohibit the exercise of Section 7 rights, absent a countervailing business interest outweighing the rule's adverse impact. *The Boeing Company*, 365 NLRB No. 154 at slip op. at 3. Here, Respondents' blogging rule allows personal use of their systems to engage in blogging, but prohibits blogging that is "detrimental to [Respondents'] best interest." The rule does not include any definitions or examples that would convey to employees that the rule is only intended to target conflicts such as nepotism, self-enrichment, and fraud. Thus, because Respondents may view many Section 7 activities, such as advocating for a union organizing campaign or criticizing Respondents in the course of a labor dispute, to be contrary to their interests, the rule, when reasonably interpreted, interferes with or prohibits the core Section 7 right to engage in such activities. It is also a content-based restriction that treats communications of a similar character differently because of their protected status, and is therefore discriminatory under the discrimination standard set forth in *Register Guard*, 351 NLRB 1110, 1118 (2007), *enforced in part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). Although Respondents may have an interest

in barring conflicts unrelated to the exercise of Section 7 rights, such as nepotism, self-enrichment, and fraud, a rule targeted more specifically at such conduct would adequately protect that interest while not interfering with employees' Section 7 rights. Accordingly, the rule is unlawful. [1]

3. Non-Solicitation/Distribution

The Board's decision in *The Boeing Company* "did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests. *UPMC*, 366 NLRB No. 142, slip op. at 1 fn. 5 (2018); see also GC 18-04, "Guidance on Handbook Rules Post-*Boeing*" (Jun. 6, 2018) at 1-2. It is well-established that employees have a right to solicit during non-working time and distribute literature during non-working time in non-working areas. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Moreover, rules that require employees to report solicitation or distribution during non-working time (and non-working areas in the case of distribution) to their employer or secure permission to engage in such activities are unlawful. *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1005-1006 (2003); *Teletech Holdings, Inc.*, 333 NLRB 402 (2001); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

Here, Respondents' rule requires that "[r]equests from outside people or organizations to…request contributions [or] distribute literature" be "referred to the Human Resources Representative." Thus, if a labor organization asked employees to solicit other employees to join the labor organization and agree to the payment of dues or political fund contributions or to distribute literature of any kind to employees, Respondents' rule requires employees report such

[1] Because this rule appears in a policy in part specifically addressing personal blogging, it would be unlawful under *Register Guard*'s discrimination standard even absent any presumed right to use Respondents' systems for blogging.

requests to Respondents, regardless of whether the requested solicitation or distribution was to take place during working time or in working areas. Although Respondents may contend that their rule is intended only to require referral of requests by outside organizations or individuals to engage in solicitation or distribution themselves on Respondents' property, the rule says nothing of the sort. It does not refer to Respondent's property, and broadly requires referral of all "requests from outside people or organizations to…request contributions [or] distribute literature," regardless of who they intend to conduct the solicitation or distribution. Respondents' Non-Solicitation/Distribution rule is therefore unlawful under long-standing Board law.

C. Hill's Discharge Violated Section 8(a)(1) and (3) of the Act

1. Legal Standard

Where an employer asserts that it took an adverse action against an employee for reasons other than his or her protected activities, to establish a violation of the Act, the General Counsel must make a prima facie showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transp. Mmgt. Corp.*, 462 U.S. 393 (1983). This prima facie showing involves four elements: union or protected activity, knowledge, animus, and adverse action. *Roadway Express*, 327 NLRB 25, 26 (1998).

An employer's animus or discriminatory motive can be established by the timing of the adverse action, the presence of other unfair labor practices, statements and actions showing the employer's hostility toward protected concerted activity, and evidence that the rationale advanced by the employer in support of its adverse action is pretext. *See, e.g.*, *Reno Hilton*

Resorts v. NLRB, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 n.2, 260 (2000) (other unfair labor practices), *enfd. mem*. 11 Fed. Appx. 372 (4th Cir. 2001); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (anti-union statements); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992) (pretext). Pretext can be evidenced by disparate treatment, shifting defenses, and false reasons. *See, e.g., Lucky Cab Company*, 360 NLRB 271, 276-77 (2014)*; Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *Seminole Fire Protection, Inc.*, 306 NLRB 590, 592 (1992) (shifting defenses); *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (timing). An employer's unexplained failure to call a witness who would reasonably be assumed to be favorably disposed toward it can also give rise to an adverse inference with respect to the employer's conduct. *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n.1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 n.1 (1977).

Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of "dual motivation" or one of "pretext." In a dual motivation case, the "employer defends against a Section 8(a)(3) charge by arguing that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for a permissible reason." *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005). Thus, the burden is to show, by a preponderance of evidence, that it, in fact, relied upon a legitimate, non-discriminatory reason, not simply to articulate a legitimate reason. *Metro Transport LLC*, 351 NLRB 657, 659 (2007). If the employer cannot demonstrate, by a preponderance of the evidence, that it would have taken adverse action against the employee for the permissible reason, then its rebuttal defense fails and a violation will be found. In a pretext case, i.e., a case in which the "reasons given for the employer's action

are . . . either false or not in fact relied upon . . . the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis." *SFO Good-Nite*, 352 NLRB 268 (2008). *See also Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004); *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

2. Analysis

Evidence supports a finding that Respondents were motivated by Hill's complaints about employees being underpaid to DeStefano on March 1, and that, similarly, Respondents took action after learning about Hill's participation in the Facebook group where she similarly argued with Estrada's significant other, Kostew, about Respondents' lack of fair wages and appreciation in the context of her role in the growing union campaign. Hill engaged in protected activity when she met with DeStefano on March 1 by complaining about wages. Hill protested, stating that Saxe wanted perfection, but was not willing to pay for it. Further, Hill was a participant on the Facebook group leading up to her discharge. Notably, the timing of Hill's discharge – close in time to Hill's argument with Kostew and Kostew's removal from the group – shows that Respondents learned of Hill's support for the campaign. Respondents' animus is shown by the timing, along with shifting reasons for its decision, including its reliance on conduct dating back months earlier and Carrigan citing scheduling issues although documents show that the initial basis had more to do with attitude. Respondents' shifting reasons are also supported by the two PAFs in the record, in which DeStefano hand wrote "+ Secondary Employment" on one, while preparing to litigate this matter. Moreover, Respondents referenced Hill's wage complaints when DeStefano documented the reason for her termination. Given the strong evidence supporting a

finding of unlawful motivation, Respondents' burden is substantial and cannot be met with by Respondent's pretextual defenses.

D. Respondents' Statements in the Midst of the Campaign Violated Section 8(a)(1) of the Act

1. Estrada's March Statements Violated the Act

"It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Am. Tissue Corp.*, 336 NLRB 435, 441 (2001); *Overnight Transp. Corp*., 296 NLRB 669, 685-687 (1989), *enfd.*, 938 F.2d 815 (7th Cir. 1991); *Southwire Co*., 282 NLRB 916 (1987) (quoting *Hanes Hosiery, Inc*., 219 NLRB 338 (1975)); *Fairleigh Dickinson Univ.*, 264 NLRB 725 (1982), *enforced mem.*, 732 F.2d 146 (3d Cir. 1984); *Am. Freightways Co.*, 124 NLRB 146 (1959). In determining whether particular statements violate Section 8(a)(1), "the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees." *Am. Tissue Corp.*, 336 NLRB at 441-42.

Estrada made several statements in about late February or early March that would reasonably tend to coerce employees in the exercise of their rights. First, in late February or early March, as discussed above, Estrada told Langstaff not to be seen talking with Graham. Langstaff had just finished talking with Graham about the union campaign. Under the circumstances, any reasonable employees would believe that their protected activity was being monitored, and indeed it was. Thus, Estrada created the impression of surveillance in violation of Section 8(a)(1) of the Act. Estrada's statement also carried with it a warning, implying that there may be consequences if Langstaff did not heed the warning. This provides a further basis to find that the

statement was an unlawful threat. Finally, Estrada directed Langstaff in no such words not to speak with Graham, who was his coworker and main organizer in the union effort. Any reasonable employee would take that as a directive from Respondent not to engage in such protected activity, thus showing that Estrada's statement was an unlawful directive.

Then, sometime in March, Estrada held a meeting with some stagehands after they were complaining about others not pulling their weight. Estrada told them that he was sick of hearing the complaints and if they did not want to work, they could get the fuck out because he had 15 people lined up ready to take their jobs. Tr. 1525-1526. Estrada was responding to complaints from some of the stagehands related to their working conditions. By telling them he was sick of hearing them complain, a reasonable employee would take that as a directive not to engage in such protected activity, which would reasonably coerce any employee in the exercise of their right to complain in the future about their working conditions. Moreover, Estrada followed up with a direct threat that would be fired for complaining about their working conditions. Accordingly, the ALJ should find that Estrada violated Section 8(a)(1) of the Act.

2. Mecca Unlawfully Interrogated Employees

Days after the March 13 union meeting, Mecca approached Glenn and asked if he knew anything about the meeting. Glenn told that he actually went to the meeting and Glenn continued to asked Mecca if he was interested in going to the next one. In determining whether an unlawful interrogation occurred, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177-78, 1178 fn. 20 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Relevant factors include: the background, including any history of hostility and discrimination; the nature of the information

sought; the identity of the questioner, including the person's position in the employer's hierarchy; the place and method of the interrogation; and the truthfulness of the employee's response. *Medcare Assoc., Inc.*, 330 NLRB 935, 939 (2000).

Here, although several factors weigh against finding Mecca's questioning unlawfully coercive (truthfulness of response, lower level supervisor, location), the nature of the information of sought weighs heavily in finding a violation. Mecca, who is also the stage manager for the show Glenn runs, directly asked Glenn what he knew about the union meeting that just happened. Mecca's question not only sought information about whether Glenn was involved, but to what extent other employees might be involved in the meeting. The ALJ should find that this type of questioning, that directly seeks the disclosure of protected activity rises to the level of unlawful interrogation.

E. Respondents' Early Response to the Union Campaign Violated Section 8(a)(3) of the Act

1. Soliciting Employees for the March 13 Work Call was Unlawful

Respondents solicited volunteers for an extensive work call to repair the Saxe Theater stage on March 13. Not-so-coincidentally, this work call was scheduled to conflict with the Union's second, and well-publicized, meeting. As with other Section 8(a)(3) allegations, the General Counsel's burden is to show that the adverse conduct was unlawfully motivated. As an initial matter, the General Counsel must show that the employer had knowledge of the protected activity. It is well-established that an employer's knowledge of union activities can be inferred based on circumstantial evidence, including: (1) general knowledge of union activities, (2) timing (i.e., adverse action close to the time of protected activity), (3) simultaneous action against more than one discriminatee, and (4) knowledge of a non-supervisory employee with a special informant-type relationship with supervisors. *See Regional Home Care, Inc.,* 329 NLRB

85 (1999); *Matthews Industries*, 312 NLRB 75, 76-77 & n. 9 (1993); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Abbey's Transportation Services, Inc.*, 284 NLRB 698 (1987).

Direct and circumstantial evidence supports a finding that Respondents knew about the campaign, and better yet, the scheduling of the March 13 meeting. The record shows that the stage managers – Estrada, Mecca, and Sojack – were well aware of the union meeting. In fact, Estrada and Sojack were invited to the meeting, and within days after, Mecca questioned an employee about it, suggesting that he was also well aware of it. Notably, although denied by Respondents, Estrada, Sojack, and Mecca attended a production meeting earlier in the day on March 13 with DeStefano and Saxe. It is undisputed that stage managers do not typically attend these types of meetings, and in fact, this was the one and only production meeting that Estrada has ever attended. It was at this meeting that Respondents decided to solicit employees, at the behest of Saxe, himself, to volunteer for the overnight work call. Respondents used Kostew as its conduit to other employees. The inexplicable timing of the stage managers' involvement in the production meeting – individuals who happen to know about the union meeting happening later that night – leads to the only reasonable inference: that the decision to order the work call is linked to their knowledge of union activity. The fact that Respondents denied the stage managers' involvement in the meeting, itself, shows an attempt to distance the decision to order the work call from the source of the knowledge of union meeting. The ALJ should view this as evidence showing that Respondents were unlawfully motivated by scheduling the work call that directly interfered with the meeting.

Moreover, the varying justifications for the timing of the work call support a finding of knowledge and unlawful motivation. As discussed in Section III.D.2.a., above, DeStefano and Saxe provided shifting and conflicting accounts of when and why the decision was made.

Evidence established that the stage was in disrepair for a period of time, and Saxe and DeStefano offered differing testimony as to how the condition of the stage was suddenly brought to their attention. Although both ultimately pointed the finger at the dance captain, Domingo, Respondents failed to corroborate that Domingo had anything to do with it. Respondents' failure to call Domingo should draw the inference that Domingo, who would be expected to be a favorable witness for Respondents, would not have been able to corroborate the basis for the timing of the decision to order the work call when Respondents did.

Finally, Respondents nearly simultaneous conduct in granting the wage increase and discharging employees, in masse, supports a finding of unlawful motivation. Just as Respondents have failed to explain the timing of the work call, Respondents are unable to explain why it granted benefits and decided to discharge a group of employees within days. Accordingly, the ALJ should find that Respondents knew of the campaign, and that the stage managers' inexplicable involvement in the production meeting, the inexplicable timing of the work call, and Respondents' simultaneous unlawful conduct shows that it was unlawfully motivated in ordering the March 13 work call that directly conflicted with the union meeting. Accordingly, the ALJ should find a violation.

2. Granting the March 14 Wage Increase was Unlawful

Promising and granting increased benefits after a union campaign commences squarely violates the Act. As the Supreme Court has observed, "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). "The lawfulness of an employer's promise of benefits during a union

organizational campaign depends upon the employer's motive. Thus, absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Sisters Camelot*, 363 NLRB No. 13, slip op. at 7 (2015).

Respondents authorized a wage increase for theater employees, in haste, on March 14, which Saxe directed to take effect retroactively. Here, direct and mounting circumstantial evidence shows that Respondents engaged in this conduct shortly after Respondents learned of employees' union efforts. In the previous weeks, employees spoke with the Stage Managers about the campaign, even inviting them to the meeting that was held on March 13. Tellingly, these Stage Managers attended a production meeting with DeStefano and Saxe on that same day, during which Estrada solicited employees to volunteer for a project that conflicted with the time of the union meeting (see discussion above). Further, Kostew's knowledge of employees' protected activity, along with the identities of the Facebook group chat participants, her special relationship with Estrada, and her references to how Estrada warned her about the consequences of prior union attempts, supports a finding that Estrada knew of the campaign before the wage increase. Finally, the fact that just one day later, on March 15, DeStefano sent a string of emails documenting the reasons for terminating eight union supporters strongly indicates Respondents' knowledge of the campaign and motivation for rushing through a retroactive wage increase. Thus, knowledge and unlawful motivation is well supported by the record.

Although Respondents claim that the wage increase was planned for months, there is no evidence support such a finding except for Respondents' self-serving testimony. In fact, documents show otherwise. DeStefano's March 4 email and Saxe's related testimony show that Saxe was considering an entirely different wage structure – from hourly, to per show – just 10

days before he implemented the hourly increase at issue here. At a minimum, this evidence undermines any showing that Respondents had an actual plan to increase wages as it did. Respondents wholly failed to otherwise explain the timing of the wage increase.

Thus, Respondents failed to provide any legitimate reason for implementing the wage increase when it did such to overcome CGC's showing that Respondents knew of the campaign, and were motivated by it in granting the wage increase. Accordingly, the ALJ should find that Respondents' conduct squarely violated the Act.

3. Discharging Theater Employees, en Masse, was Unlawful

a. Respondents' Were Unlawfully Motivated to Discharge Employees, en Masse

In a mass discharge case, as here, the "General Counsel's burden [is] to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some." *ACTIV Industries, Inc.*, 277 NLRB 356, 356 n.3 (1985). Although CGC has done so in this case, as discussed below, "the General Counsel [is] not required to show a correlation between each employee's union activity and his or her discharge. *Id*. (citing *Pyro Mining Co.*, 230 NLRB 782 (1977); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985)). Rather, the burden is carried by showing an unlawful motivation for the mass discharge, not necessarily the "selection of employees for the discharge." *Id*; *see also Johnson Distributorship, Inc.*, 323 NLRB 1213, 1224 (1997)("[W]here, as here the discriminatory motivation for a mass discharge is clear, it is not necessary to establish the union activity of each discharged employee); *Am. Wire Prod., Inc.*, 313 NLRB 989, 995 (1994) ("[W]hen circumstances demonstrate a mass discharge for unlawful purposes . . . it is unnecessary to show employer knowledge of union activity of each specific discharge[.]"). Unlawful motivation may be shown by "unexplainable timing" of the decision, the failure to

provide "meaningful" or "plausible" reasons for its conduct, or other factors evidencing pretext. *Am. Wire Prod., Inc.*, 313 NLRB at 994-995; see also *Lucky Cab Co.*, 360 NLBR at 274-75. Once the General Counsel establishes a prima facie case, the burden shifts to Respondents to show that it would have taken the same action even in the absence of union considerations. *Am. Wire Prod., Inc.*, 313 NLRB at 995. However, upon a strong showing from the General Counsel, Respondents' burden "is substantial." *Id*.

Here, CGC has overwhelmingly met its burden. As discussed throughout Section III.D.1, and above, evidence shows that Respondents, including Saxe, DeStefano, and the stage managers, found out about the campaign as early as late February. Then, within a matter of two weeks or less, DeStefano met with Saxe on March 15 to discuss which employees to get rid of. This meeting between them came on the heels of the momentous March 13 union meeting, and the late-night wage increase. The timing alone under these circumstances supports a finding that Respondents' were unlawfully motivated by the budding union campaign in deciding to discharge employees in mass.

Additionally, Respondents' attempt, primarily through Saxe, to deny that there ever was a point in time that they decided to discharge a group of employees at the same time supports a finding of unlawful motivation. The record, as discussed in Section X above, clearly shows that Respondents decided to discharge a group of eight employees at the same time. By denying a key fact – timing – which is well-established, Respondents have in effect set forth a false reason for its conduct, evidencing the pretext underpinning the entirety of the circumstances.

Further, the implausibility of Respondents' justifications for its conduct supports a finding of unlawful motivation. Saxe and DeStefano would have the ALJ believe that they failed to act on their intention to discharge employees for months because DeStefano's hands were tied

by Pendergraft, and Pendergraft failed to carry out Saxe's expectations with regard to discharging employees. However, the record shows that DeStefano's hands were not tied insofar as she dished out discipline and even discharged employees while Pendergraft was still employed. And, the record is devoid of any evidence, aside from Saxe's self-serving testimony, that he ever expected or directed Pendergraft to take action with regard to discharging employees. Rather, the record shows that on at least one occasion, Saxe directed Pendergraft (and DeStefano) to take action against an employee for standing around, and DeStefano followed Pendergraft's lead in following through on that direction.[62] In other words, the record shows evidence of Pendergraft following through on Saxe's overbearing directives. Furthermore, if Saxe had actually directed Pendergraft to follow through on discharging employees, one would expect a trail of written communications, but there is none. Thus, Respondents' explanation for why it waited, or even that it waited at all, is unsupported by the record, and implausible at best.

Respondents' differing explanations as to what "restructuring" was, shows shifting reasons, further supporting a finding of unlawful motivation and pretext. Saxe explained that restructuring was meant to get rid of the "scumbag" employees, whereas DeStefano explained it in terms of a solution for more efficient or effective scheduling. Taken as a whole, Saxe emphasis on restructuring was clearly a means of getting rid of employees, for the sake of getting rid of them. And, although DeStefano testified as to certain employees she, at times, wanted to get rid of, that was not the impetus of the restructuring plan, according to her. These differing accounts of restructuring, insofar as it was put forth to justify Respondents' conduct, are akin to shifting reasons, which shows pretext.

Finally, Respondents' unlawful motivation is strongly demonstrated by the pretextual reasons, often blatant, set forth for each employee's discharge. For example, DeStefano relied

[62] See discussion on in Section III.D.2.c, regarding the alleged Bohannon discipline.

on Suapaia's physical disability, and the fact that Respondents accommodated him in 2017, to justify his discharge. Similarly, DeStefano relied on Tupy's medical needs for a flexible schedule that she was apparently well aware of, and Respondents had a practice of accommodating, to suddenly justify getting rid of him. By way of another example, DeStefano provided shifting reasons for discharging Franco – first claiming an elimination of position, and then relying on performance which she could only support by after-acquired statements – while also denying that she ever attempted to tee up the first justification. Further, the sheer number of reasons that were set forth for Glick's discharge, when there is no evidence of an actual precipitating event or even a disciplinary record, shows an obvious exaggeration of the circumstances. This small sample of setting forth justifications steeped in pretext supports a finding that Respondents were unlawfully motivated by its mass discharge decision, yet as discussed below, there is evidence of pretext in each individual case.

In light of CGC's strong showing that Respondents' were unlawfully motivated to discharge employees, en masse, Respondents burden is substantial. Further, because Respondents' justifications are pretext, as discussed above, Respondents are essentially precluded from showing that it would have taken the same action regardless of the union campaign. *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008). Accordingly, the ALJ should find that Respondents, by its mass discharge, including Glick, Bohannon, Franco, Suapaia, Langstaff, Gasca, and Michaels, violated Section 8(a)(3) of the Act.

b. Theater Employees' Discharges Were Unlawful Under *Wrights Line*

Even if CGC has not shown that Respondents' mass discharge decision, itself, was unlawful, the ALJ should find that each employee was discharged unlawfully under the *Wright Line* framework. In each instance, GCG has shown evidence that Respondents knew of, or had

reason to suspect, that they were engaged in protected activity. The record also shows that Respondents harbored animus toward the protected activity. Finally, Respondents will be unable to show that it would have taken the same action regardless of the protected activity, primarily because its reasons for discharging each of them shows signs of pretext. Moreover, the overall timing of the decisions, as discussed above, strongly indicates that Respondents did not, in fact, rely on any of the reasons purported to support the discharges. Each is addressed in turn below.

i. Jasmine Glick

Glick was one of the lead employee organizers. She talked about the campaign at work, went to union meetings, passed out authorization cards, and heavily participated in the Facebook group. Knowledge is established through Respondents' general knowledge of the campaign, Respondents' active monitoring of the surveillance footage, and the veiled language sprinkled throughout Saxe's testimony and within DeStefano's discharge documents (March 15 email and PAF). In that regard, Saxe mentioned that she was discharged for hanging around Saxe Theater in March. Coincidentally, this is when and where she was soliciting support for the union. The discharge documents refer to concerns of her "attitude spreading" and describe her as a "bit of a cancer." Veiled language such as this supports finding animus, and provides additional circumstantial evidence that Respondents knew or suspected Glick was behind the campaign. Moreover, timing also supports a finding of knowledge.

Evidence shows that Respondents' animus runs deep. Respondents' innumerable, unsupported, false, and shifting reasons for Glick's discharge support a finding of animus and pretext.[63] For example, DeStefano testified that the main reasons for her discharge were cell phone use and attendance. However, Respondents' termination form does not mention cell phone policy violations or attendance issues. Rather, the form documents Glick's "long history

[63] The full scope of these reasons are discussed above, in Section III.D.3.i.

of insubordination," even though there is no evidence that Glick engaged in insubordination. Additionally, of all the reasons Saxe cited, he did not mention cell phone usage. These shifting reasons show pretext, also supporting a finding of animus.

Further, DeStefano documented a host of other reasons for Glick's discharge, mostly centered on her attitude. For example, within DeStefano's parade of emails on March 15 to Saxe she described Glick as "a bit of a cancer around here with her attitude and mouth." DeStefano also cited Glick's criticism of management and the company as a reason to discharge her. DeStefano was concerned that Glick's attitude was "spreading to other employees." Saxe also mentioned that one of the reasons was because Glick was standing around, in March, in Saxe Theater not working. All of these things appear to be veiled language in reference to her protected activity which not only supports a finding of anti-union animus, but also strongly supports a finding that the other reasons cited by Respondents were not, in fact, relied upon. *See NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991); *Promenade Garage Corp.*, 314 NLRB 172, 179-180 (1994); *Cook Family Foods*, 311 NLRB 1299, 1319 (1993); *McCotter Motors Co.*, 291 NLRB 764, 771 (1988).

DeStefano gave false reasons to Glick, and some others, by saying that Respondents were going to start hiring from a third party. There is no evidence suggesting this was remotely true. This shows, yet further shifting reasons, which are also false, evidencing pretext and supporting a finding of animus.

Finally, the lack of disciplinary records or any kind of documentation (that was not created or gathered after-the-fact) undercuts Respondents' claim that Glick engaged in various forms of misconduct or that they relied on such misconduct in deciding to discharge her. Moreover, a lot of the conduct cited, at least by Saxe, dates back to 2017 or before Glick was

even rehired. These stale, and likely conjured reasons, further support a finding that Respondents' reasons are pretext. Accordingly, the ALJ should find that just as Respondents' reasons for the mass discharge itself are steeped in pretense, the reasons set forth for discharge Glick are too. Thus, Respondents will be unable to show that it actually relied upon any legitimate non-discriminatory reason for her discharge.

ii. Taylor Bohannon

Bohannon engaged in protected activity by going to union meetings and participating in the Facebook group chat. She was one of the employees that attended the first union meeting and designated to spread the word about the campaign from that point. As with the others, Respondents' knowledge is established through the general knowledge of the campaign, Respondents' active monitoring of the surveillance cameras, and the timing its conduct on the heels of the March 13 union meeting.

Evidence that Respondents' reasons are pretextual, support a finding of animus and undermine any showing that Respondents would have taken the same action regardless of Bohannon's protected activity. With regard to Bohannon, Respondents claim that Saxe received several complaints about her abilities as an audio technician just weeks before her termination. However, Saxe's testimony shows that he was unsure of when he received the complaints. He testified that McCambridge initially complained about Bohannon in either February or early March. However, although McCambridge testified, he was unable to corroborate Saxe's timeline. Regardless, even if McCambridge complained to Saxe in February or early March, Respondents have not explained why they did not immediately investigate Bohannon's purported performance issues or take corrective action. Indeed, even crediting Saxe's testimony, Respondents inexplicably waited two weeks before investigating the matter or discharging

Bohannon. Again, the suspicious timing and lack of substantive investigation support a finding that Respondents were motivated by the budding union campaign and Bohannon's central role in it. *Traction Wholesale Center Co., Inc. v. NLRB,* 216 F.3d at 99; *Lucky Cab Co.*, 360 NLBR at 274-75.

To further compound the showing of pretext related to Bohannon, internal emails show that the decision maker, DeStefano, considered Bohannon "a great audio tech" as of March 1, 2018. Even after DeStefano apparently started looking into Bohannon's performance issues on March 15, DeStefano reported to Saxe that Bohannon was not "screwing up" but that her performance was average. Then, less than 12 hours later and within the succession of emails laying the groundwork to discharge all of the other suspected union agitators, DeStefano switched her tone and dramatically relayed to Saxe that the quality of the shows was at risk with Bohannon running audio. Based on Respondents' shifting evaluation of Bohannon's performance and Respondents' other simultaneous unlawful conduct, including its decision to discharge employees, en masse, CGC met its burden in showing that Respondents reasons are pretexual, such that Respondents are unable to meet its burden in showing a legitimate, lawful justification for its decision to discharge Bohannon.

iii. Nathaniel Franco

Franco engaged in protected activity by going to union meeting, participating in the group chat, and discussing the union effort with other employees at the theater. Respondents' knowledge is established by its general knowledge of the union campaign, its active monitoring of the theater through surveillance footage, and the inexplicable timing of its conduct. Respondents

Evidence supports a finding that Respondents' reason for discharging Franco is pretextual, which supports a finding of animus and undermines any showing that Respondents would have taken the same action, when it did, regardless of his protected activity. Respondents contend that Franco was discharged for poor performance. However, Respondents provided shifting and false reasons for his discharge, which shows pretext. On March 14, the day before DeStefano sent Saxe the final email documenting the reasons for terminating Franco, and just hours before DeStefano initially documented any performance issues, she told Saxe she was going to discharge Franco because she was eliminating his swing position, consistent with the "restructuring" justifications heard by other employees. Even after Saxe lamented that Franco should be discharged for performance, DeStefano reiterated that she was in fact eliminating the swing position. Not only does this show shifting reasons, but it also shows that DeStefano provided a false reason as she admitted that she did eliminate the swing position and hired someone else for that position after discharging Franco, just as Saxe warned would be a problem under the funny labor laws.

Moreover, to the extent that Franco, in-fact, had performance issues, the record suggests that Respondents tolerated it, and Respondents have failed to explain why, suddenly, in the midst of the campaign, it could no longer do so. DeStefano's attempted to show that she had recently received complaints from Domingo and Hardin, her testimony about receiving an email from them prior to the discharge is unsupported. Rather, evidence shows that they provided statements about Franco's performance after the fact, not before. Thus, DeStefano's reasoning for the timing of her decision rests on a falsehood, further supporting a finding that Respondents' justifications are no more than pretext, adding to the evidence showing Respondents animus.

Accordingly, based on Respondents shifting and false reasons that strongly support a finding of pretext, Respondents are unable to show that it would have taken the action against Franco at the time that they did, in absence of his protected activity.

iv. Chris S'uapaia

Suapaia engaged in protected activity by going to the union meeting on March 13. Notably, Respondents would have reason to know or suspect that he was going to the meeting because he was at the theater earlier, and turned down the "opportunity" to assist with the work call. Under these circumstances, combined with the breath of other evidence that Respondents knew about campaign, CGC established knowledge.

The record strongly supports a finding that Respondents' proffered reasons for discharging Suapaia are pretextual, which shows Respondents animus and precludes a showing from Respondents that they would have discharged him regardless of his protected activity. Respondents claim that Suapaia was discharged for attendance issues and his "fear" of walking backwards. DeStefano's reliance on Suapaia's disability as a reason for this termination should be considered evidence of pretext for a myriad of reasons. For starters, the underlying facts involving Sojack accommodating Suapaia date back to 2017, which indicates that DeStefano was attempting to pile on any imaginable reason given the staleness of the apparent issue, to mask the actual motivation – crippling the campaign by getting rid of supporters. Also, Respondents had a history of accommodating Suapaia's disability and provided no reason why, suddenly, they could no longer do so. Furthermore, the stunning admission that Respondents discharged Suapaia because of his disability indicates that, in haste, DeStefano put forward one discriminatory reason to mask another. Moreover, DeStefano's characterization of Suapaia's disability as a

"fear" only highlights DeStefano's propensity to stretch the truth, which, again, supports a finding that Respondents' reasons for discharging Suapaia are made from whole cloth.

Further, with regard to his attendance issues or "shrinking availability," Estrada, admittedly, approved Suapaia's requests for time of most of the time. There is no evidence that Suapaia was ever spoken to, or disciplined in any way, for his attendance. Respondents have wholly failed to explain why it would take the drastic measure of discharging Suapaia for attendance issues, rather than issue discipline, even though Carrigan testified that she expects Respondents' supervisors to follow a progressive discipline policy. This point rings true for all of the employees who were discharged. This supports a finding that even if Suapaia had attendance issues, Respondents did not in fact rely upon those issues in deciding to discharge him. Rather as the record as a whole overwhelming shows, Respondents took action because of the campaign and who they knew or suspected supported it. Accordingly, the ALJ should find that CGC met its burden here, Respondents have failed to show, based on the scope of pretext evidence, that it based its decisions on legitimate, nondiscriminatory reasons.

v. Alanzi Langstaff

Langstaff engaged in union activity by discussing the campaign with Graham and telling him that he would sign an authorization card at Respondents' facility. Respondents' knowledge is established by the fact that Estrada warned Langstaff not to be seen with Graham, whom Respondents admittedly pegged as a union organizer, just after the interaction. Estrada's warning, which independently violates the Act,[64] also supports a finding of animus.

The record supports a finding that Respondents' proffered reasons for discharging Lanagstaff are pretextual, which supports a finding of animus. In documenting the reasons for Langstaff's termination, Respondents took the shotgun approach, citing work ethic, laziness,

[64] See Section IV.C, above.

poor job performance, attitude, arguments with coworkers, complaining about favoritism, and tardiness. GCX 34; GCX 7. Saxe even testified that Langstaff was discharged for getting in a fistfight, which is a wholly unsupported fabrication. To add to the scattershot reasons for Respondents' decision to discharge Langstaff, Carrigan (Carrigan) and DeStefano told him that is was due to "restructuring" and that Respondents were going to bring in stagehands from an "outside source," which was not true. These exaggerated, shifting, numerous, stale, and fabricated reasons strongly show animus and pretext. *See, e.g.*, *Lucky Cab Company*, 360 NLRB at 274; *ManorCare Health Services – Easton*, 356 NLRB at 204; *Greco & Haines, Inc.*, 306 NLRB at 634; *Metro Transport LLC*, 351 NLRB at 658. *Wright Line*, 251 NLRB at 1088 n. 12 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d at 470); *Cincinnati Truck Center*, 315 NLRB at 556-57. Moreover, even if Respondents' reasons rang true, Langstaff worked for Respondents for over a year, and Respondents' tolerance of Langstaff's alleged misconduct during that time raises even more suspicion about the timing of his discharge, further supporting a finding of unlawful motivation.

Accordingly, based on the strong showing that Respondents' reasons were no more than pretext, it is unable to show that it would have taken the same action against Langstaff regardless of his protected activity.

vi. Michael Gasca

The record shows that Gasca engaged in protected activity by requesting a leave of absence to pursue the union apprenticeship program in late 2017, and by informing Estrada and Sojack that he got accepted into the program in March. This conduct would also give Respondents' every reason to believe that Gasca was or would be keen on supporting the union

campaign that was underway. Thus, Respondents knew about his union apprenticeship activity, and would reasonably suspect him as supporting the union campaign.

The record also supports a finding of animus by DeStefano's veiled references to the apprenticeship program, including the notation in his personnel action form referring to when he "left 'on absence'", and her narrative in the March 15 email referring to his "other opportunity." At other times she described his request as related to a "school" opportunity. Clearly, although she would directly admit it, she knew full well what he was pursuing, and her repeated references to it related to her decision to discharge him, shows that it was a motivation.

Further, the discharge related documents DeStefano drafted are riddled with references to Gasca's attitude, including how she was concerned about his "behavior and attitude spreading and making other employees uncomfortable." Again, this should be viewed as a veiled reference to his suspected support for the campaign, supporting a finding of animus.

The record also shows that DeStefano's reasons for discharging Gasca are pretext, again showing animus. Here, DeStefano claimed that she "restructured" so that she did not need on-call employees, and also discharged another on-call employee along with Gasca because of it. As discussed above, the record does not support her claim. In fact, personnel records show that the other employee quit, had not worked since September 2017, and DeStefano doubted whether the other employee would have even known he was still on the payroll. Moreover, just prior to his discharge, Gasca requested to have more, regular hours, which DeStefano was apparently aware of as it is referenced in his personnel action form. So, even if Respondents were truly eliminating on-call positions, they could have granted his request and scheduled him part-time, consistent with his schedule prior to his pursuit of the union apprenticeship program. Furthermore, DeStefano testified that the reason for Gasca's discharge turned from his attitude or performance

into the on-call elimination. So, not only is the purported reason false, but the record shows shifting reasons. For these reasons, Respondents' reason of eliminating on-calls is pretext.

Accordingly, the ALJ should find that CGC met its burden under *Wright Line* and that the clear evidence of pretext is such that Respondents are unable to show that they would have discharged Gasca in absence of his known and suspected union activity.

vii. Kevin Michaels

The record shows that Michaels engaged in union activity by speaking with employees at work and going to the March 13 meeting. Notably, Michaels skipped out of the work call early telling Estrada that he had something to do. As discussed throughout, Respondents knowledge through their active monitoring of the surveillance cameras, the general knowledge of the campaign, and specifically, here, Estrada's knowledge of the conflicting union meeting that was taking place at the same time as the work call.

With regard to Michaels, the record shows the pretextual nature of Respondents' justifications for discharging him, which supports a finding of animus. As discussed above, DeStefano testified for Respondents about the reason for Michaels' termination and only cited his failure to follow the schedule.[65] However, previously, and within the discharge documents, DeStefano cited many other reasons including Michaels' alleged unwillingness to learn other tracks, poor work performance, and a concern that his attitude bleeds to others. Again, Respondents' additional reasons and veiled language support a finding of animus and pretext. *See NLRB v. Hale Container Line, Inc.*, 943 F.2d at 400; *Lucky Cab Company*, 360 NLRB at 274; *Promenade Garage Corp.*, 314 NLRB at 179-180 (1994); *Cook Family Foods*, 311 NLRB

[65] For the reasons discussed in Section Section III.D.3.vii, above, the ALJ should find that even if Michaels did not follow DeStefano's schedule, she did not, as she claims, instruct him to change his ways on a weekly basis leading up to his termination, thus further supporting a finding of pretext because of the exaggerated nature of DeStefano's claims.

at 1319 ; *McCotter Motors Co.*, 291 NLRB at 771. Moreover, Michaels testified that he was willing to learn other tracks and actually suggested to Estrada that all the stagehands, including himself, learn every track on one of the shows, and Estrada did not corroborate DeStefano's claim about Michaels' unwillingness to learn new track. Furthermore, Michaels ran one of the most difficult tracks, which undermines DeStefano's claim that he was a poor performer unwilling to pitch up. Thus, Respondents' additional reason does not add up, further supporting a finding of pretext.

Accordingly, the ALJ should find that under *Wright Line*, CGC met its burden, and the evidence of pretext in this instance, and throughout the record, squarely undermines any attempt by Respondents to show that they would have taken the same action against Michaels regardless of his protected activity.

viii. Zachary Graham

The record shows that while Graham was not working due to his broken arm, he engaged in union activity, as one of the lead organizers, by participating on the Facebook group chat, going to union meetings, and even stopping by the Saxe Theater to discuss the campaign with other employees. Notably, Graham went to the theater on about February 28 or March 1 after attending the initial union meeting. He spoke with the majority of the Saxe Theater stagehands, including Langstaff, to inform them of the campaign and feel out interest. He did the same with Estrada, thus showing Respondents' knowledge.

The record supports a finding that Respondents harbored animus toward the campaign and Graham's participation in it. The pretextual nature of Respondents' reasons for Graham's discharge, and the timing of it, shows animus. Respondents claim that Graham was discharged on March 21 because he failed to provide requested medical documentation and he was

unreachable for 20 days, despite attempts from DeStefano and Estrada through calls and text messages. However, Graham's testimony, which is consistent with documentary evidence, shows that DeStefano's claim is patently false. Phone records and a screenshot of Graham's text messages with DeStefano support a finding that DeStefano never tried to contact him after an email exchange on February 28. And, although Respondents may argue that the records Graham provided are not dispositive on the issue, Respondents wholly failed to provide any records of its own to show that DeStefano, in fact, tried to reach Graham for 20 days. Furthermore, if DeStefano was actually trying to reach Graham, she never attempted by email even though records show that they otherwise communicated that way. Thus, Respondents' proffered reason that Graham was unreachable is false, showing pretext and animus.

Further showing pretext are several additional falsehoods and notable omissions from an email DeStefano sent to Saxe on March 21 detailing the reasons for Graham's termination. The timeline she provides to Saxe (or to some other audience perhaps) with regard to her contact with Graham makes it seem as though the last time he ever communicated with her was on February 22 or 23, at which time she claims to have requested a medical note and "paperwork" to put into the system from him, *after* having spoken with human resources by that point. Continuing, her narrative attempts to show that she followed up on February 24 with the text message, again requesting the medical note, but since that time, Graham was unreachable. Omitted from her email is any mention of her further communication with Graham via email on February 28 in which he offered to come to work even while injured. Moreover, contrary to her March 21 assertion that she had already received direction from human resources, which she allegedly relayed to Graham back on February 22, the February 28 email thread shows that DeStefano was, at that point, clueless about how to address Graham's situation as she sought out advice

from human resources on that day. This indicates that, like the other discharge emails DeStefano sent to Saxe, she drafted reasons in order to support a false narrative, which supports a finding of animus, and pretext.

Further supporting this conclusion is the fact that DeStefano's March 21 discharge email states that she decided to discharge Graham on March 1 (coincidentally right when he started organizing the stagehands). But, she clearly spoke with Graham on February 28 when he offered to work and updated her on his condition. Again, this shows that the narrative she attempted to curate in her discharge email is nonsensical when the whole picture comes to light, thus revealing why she omitted February 28 communications within that narrative to begin with.

Finally, aside from DeStefano's false narrative, the record shows that she told Graham not to worry about providing any further paperwork than what he already had. In fact, there is no evidence showing that DeStefano ever heard back from human resources with direction on what to do after February 28, and even if she did hear back, there is no evidence she actually relayed such information to Graham. Rather, she told Graham not to worry about it, which is consistent with the internal communications between DeStefano and Carrigan on February 28. Accordingly, the ALJ should also find that Destefano's proffered reason for discharging Graham, insofar as he did not provide the required medical documentation, is another false reason supporting a finding of pretext and animus.

Accordingly, CGC has met its burden in showing that Graham engaged in protected activity, Respondents' knew about it, and its justifications for taking action against him are simply not true. In light of this showing, Respondents are unable to show that they would have taken the same action regardless of the union campaign, or Graham's involvement in it.

4. Scott Leigh's Discharge was Unlawful

The record supports a finding that Warehouse Technician Leigh was discharged on April 17 because he engaged in union activity. As discussed below, CGC met its *Wright Line* burden. First, Leigh engaged in union activity by actively soliciting his coworkers to sign union authorization cards in the warehouse and the parking lot at the Oquendo facility on April 10 and 11. Respondents' knowledge of Leigh's union activity is shown by the timing of the swift action taken against him shortly after he collected the cards, Respondents' active monitoring of surveillance cameras which are located in the warehouse, the fact that someone in management monitored Leigh over the surveillance cameras on April 12[66] (or April 13), the fact that Leigh solicited some cards in his welding area where there are cameras, the fact that Saxe's office apparently has windows overlooking the warehouse area, the fact that Respondents were concerned that Leigh was blocking his welding pit from view of the cameras around this time, Thomas' discussion with human resource representative Brass after he signed a card, and Saxe's confrontation with Leigh on April 13 when Saxe, at a minimum, referred to Leigh "offering" training, which was a key part of Leigh's pitch to his coworkers.

The record also supports a finding of animus. First, Saxe's questioning of Leigh on April 13 independently violates the Act[67] and supports a finding of animus. First, suspicious timing is highly indicative of Respondents unlawful motivation. Soon after April 13, when Saxe likely

[66] See RX 64.

[67] Saxe questioning Leigh about whether he was signing people up for free union training violates Section 8(a)(1) of the Act as an unlawful interrogation. All of the Bourne factors weigh in favor of finding a violation. Saxe is the highest level company official; he pulled Leigh into a stuffy conference room; the nature of the questioning was directly aimed at eliciting information about protected activity; and given Respondents other conduct in this matter, there was a backdrop of hostility toward protected activity. Further, Saxe's question would leave Leigh, and any other reasonable employee with the impression that Saxe was monitoring employees' union activity, especially since Leigh had just been, in a sense, signing employees up for the union and Saxe did not disclose how he knew such things. Accordingly, Saxe also violated the Section 8(a)(1) of the Act by creating the impression that employees' union activity was under surveillance.

found out about Leigh's conduct based on his questioning of Leigh, the dominos began to fall. First thing on the following Monday, April 16, Saxe sent Carrigan an email with the subject line "Scott write ups" requesting to meet to "go over [Leigh's] infractions."[68] Then, 30 minutes later, Saxe sent an email to human resources providing a narrative very similar in tone to DeStefano's discharge emails for the theater employees. Saxe raised Leigh's training of other employees to weld as an issue, along with Leigh's purported avoidance of work, bad attitude, and ability to get along with others. The email concludes with a note about how they should talk with Leigh one more time and warn him that he will be "termed" if he doesn't do his job.

Then, *after* Saxe sent his email with the subject line, "Scott write ups," Respondents wrote him up, twice, as they claim, for conduct occurring that very day. The first is for leaving metal outside where it could be ruined, and the second was for refusing to remove items stacked up by the welding pit that were blocking the surveillance cameras (per Saxe). Not only does the timing smell foul based on the apparent plan to issue him write-ups, but the documents show that the second write-up was likely created on the day Leigh was discharged, not the day before. At the very least, the fact that the second disciplinary form was amended and finalized on April 17 rather than April 16, undermines Carrigan's hearsay testimony that Leigh was even given the discipline or that the incident ever occurred. The ALJ should find that, rather than supporting Saxe's narrative that Leigh had performance issues, the paper trail shows an attempted cover-up gone bad; that Respondents concocted issues that it could later rely upon in articulating a legitimate reason for Leigh's discharge.

Further, Respondents sudden concern that Leigh was blocking the cameras with stacked items from viewing his working area – the welding pit – is directly connected with Leigh's protected activity. Leigh got several union cards signed near this area just days before

[68] GCX 87

Respondents allegedly told him to remove the items, which formed the basis for the second write-up. Later, Hunt drafted an email to Saxe mentioning how her concern that Leigh was "intentionally . . . blocking the security cameras" was "solidified." Respondents sudden concern about being able to view Leigh through the security cameras suggests that they were keen on keeping an eye out for further union activity, and Respondents' reliance on this as a partial reason for his termination ties their motive to his protected activity, thus showing animus.

Finally, the record also shows that Respondents' reliance on Leigh's attendance issues or the fact that he called out on the day he was discharged is pretextual. First, the record shows that Respondents tolerated Leigh's absences and failed to show why, suddenly, after he started organizing for the Union, his calling out was a dischargeable offense. In fact, even though Carrigan sent him an email in January warning him about his excessive absences, he continued to call off at least three times prior to April 17, yet based on the lack of any follow up or actual discipline, Respondents continued to tolerate it. Thus, based on its tolerance of the same conduct it later cited for his discharge, Respondents can hardly show that it would have discharged Leigh because of his attendance regardless of his protected activity.

Accordingly, based on the highly suspicious timing, the apparent plan to set the discharge wheels in motion before the fact, and other evidence showing animus, the ALJ should find that CGC met its burden in showing that Respondents discharged Leigh because of union activity, and would not have done so, regardless.

5. Promoting Kostew to Call Cues Was Unlawful

The Board applies *Wright Line* in determining whether an employer's decision to promote certain employees was unlawfully motivated, in violation of Section 8(a)(3) of the Act. *General Motors Corp.*, 347 NLRB No. 67 (2006); *Hampton House*, 317 NLRB 1005, 1005-1006

(1995). Here, in late February or early March, Kostew was chosen to start training for the position, but did not actually run the show calling cues on her own until April 23. GCX 60; GCX 61; Tr. 375-378. The record supports a finding that Respondents were unlawfully motivated by the union campaign, and Kostew's anti-union position, in deciding to promote Kostew to the position calling cues for *Vegas! The Show*. Respondents' knowledge of the campaign is established as early as late February when Kostew was given the green light on the Facebook group chat to inform Estrada about the organizing efforts. Further, as discussed above, the timing of Hill's discharge, just after Kostew's fall-out and removal from the group, in conjunction with Kostew's romantic relationship with Estrada and all the other evidence supporting that Kostew told Estrada about the campaign, supports finding that Kostew informed on the group by the time she was chosen to start training for the position.

Record evidence also supports finding that Respondents reasons for promoting Kostew to this position are pretext, which supports a finding of animus. DeStefano testified that she chose Kostew based on her reliability, and the fact that Kostew knew the show "like the back of her hand," including that she knew a lot of the tracks in the show. Tr. 2753-2754; 2786:23-2787:11. However, just weeks before DeStefano chose Kostew for the position she ranked all of the stagehands, in her opinion, from best to worst. DeStefano based her rankings on reliability, attitude, how many tracks they knew, and their willingness to work. RX 31. As of February 6, based on those factors, Kostew ranked 15 of 21. When confronted with this, DeStefano pulled the Pendergraft card, explaining that Kostew's attitude changed after he left. Notably though, DeStefano was clear that it was not her abilities that changed, but her attitude. Tr. 2788. DeStefano's explanation does not account for all the factors she ranked the stagehands on, and moreover, her emphasis on attitude supports finding veiled language indicative of animus.

Accordingly, the ALJ should find that Respondents reasons are pretextual and that without Kostew's assistance with the anti-union effort, would not have been chosen for the position of calling cues.

F. Respondents' Statements and Conduct Leading up to the Election Violated Section 8(a)(1)

1. Saxe's May 15 Statements Were Unlawful

On May 15, Saxe spoke with employee Prieto after the captive audience meeting. He told Prieto that he knew he was pro-union without disclosing how he learned that. "The Board has long held that, when, in comments to its employees, an employer specifically names other employees as having started a union movement or as being among the union leaders, the employer unlawfully creates the impression, in the minds of its employees, that he has been engaging in surveillance of his employees' union activities." *Royal Manor Convalescent Hosp.*, 322 NLRB 354, 362 (1996), enfd. 141 F.3d 1178 (9th Cir. 1998). See also *Farm Fresh Co., Target One, LLC*, 361 NLRB 848 (2014); *Sam's Club*, 342 NLRB 620, 620-21 (2004); *Avondale Indus., Inc.*, 329 NLRB 1064, 1225 (1999); *Flexsteel Indus.*, 311 NLRB 257, 257 (1993). Accordingly, by pointing out that he knew Prieto was pro-union, Saxe created the impression that he was monitoring who was behind the campaign in violation of the Act, as alleged in Complaint paragraph 5(h)(i).

Saxe continued in the conversation, asking if Prieto had ever reached out to him about any issues. In other words, Saxe's question was intended to elicit what kind of grievances or complaints Prieto might have. An employer's solicitation of grievances during the course of a union campaign is reasonably understood by employees as an implicit promise to rectify such grievance or improve working conditions and violates the Act. *Alamo Rent-A-Car*, 336 NLRB

1155, 1155 (2001). Accordingly, the ALJ should find merit to the allegation alleged in Complaint paragraph 5(h)(ii).

Similarly, Saxe approached employees Tupy and Glenn on May 15, telling them that he knew they were pro-union and that he had lost them in the upcoming vote. By singling them out and disclosing that he knew they supported the union and that they were going to vote yes for the Union, Saxe created the impression that he was keeping tabs on employees' union sentiments and activity. Accordingly, the ALJ should find that Saxe created the impression among employees that their union activities were under surveillance, in violation of Section 8(a)(1) of the Act, as alleged in Complaint paragraph 5(j)(i) and (ii).

2. DeStefano's May 16 Text Messages Were Unlawful

Employees' choice of whether to vote in an election or not is a protected right. Employers do not have a corollary right to know whether an employee chooses to exercise that right. See *B&K Builders, Inc.*, 325 NLRB 693 (1998) (finding an employer created the impression of surveillance by asking employees about their intentions to cast ballots in a Board election).

DeStefano's text messages, instructing employees to inform her one way or the other whether they would be using the shuttle bus to the election site would leave any reasonable employee with the impression that Respondents were keeping track of who exercised their right to vote and who did not. Moreover, DeStefano's text messages went even further, effectively providing a means of actually keeping track of who voted in the election or not. For those that she scheduled that day, Respondents would know if they used their shuttle service, and for those that were not scheduled, DeStefano was able to keep tabs by the responses she solicited via her text messages. Thus, DeStefano's text message played in integral role in Respondents' ability to engage in the surveillance of employees' right to choose whether to vote in an election.

Accordingly, the ALJ should find that Respondents (1) created the impression of surveillance, and (2) engaged in surveillance, by sending DeStefano's text messages that instructed employees to inform her about whether or not they would be using Respondents shuttle service to the election site, in violation of Section 8(a)(1) of the Act.

3. Respondents' Time Clock and Notice Posting Conduct was Unlawful

As discussed above, after the Union filed the Petition for Representation Election in late April, Respondents curiously posted the Notice of Petition in a locked office connected to a wing of managers' offices, covered by surveillance cameras. Then, about a week later, Respondents relocated a time clock used by employees to the office, but unlocked the office, apparently so employees who did not otherwise have special access to the office could use the time clock there. The time clock was not originally covered by surveillance cameras, or at least a reasonable employee would not believe so because of the location near the main entry way. Later, Respondents posted a copy of the Notice of Election in the same location, and the time clock was also still there in the managers' suite area.

The ALJ should find that Respondents' conduct violated Section 8(a)(1) of the Act by creating the impression that employees' activities were under surveillance, and by actually surveilling employees protected activity. Under the circumstances, a reasonable employee would understand Respondents' conduct as essentially creating an atmosphere where, in order to get information about the Union's petition or the representation process, one would have to disclose their interest by venturing to the area most surrounded by cameras and management. Thus, an employee would reasonably believe that Respondents were likewise keeping of track of which employees disclosed their interest in the union matters, for there is no other reasonable explanation for Respondents' conduct, or at least none that was communicated to employees.

Thus, an inference is strongly supported, based on there being no reasonable explanation, that Respondents were not only creating the impression of surveillance, but were actually engaged in surveillance by its conduct.

G. Respondents' Conduct Following the Election Violated Section 8(a)(3) of the Act

1. Reducing Glenn and Tupy's Hours, and Disciplining Tupy was Unlawful

Respondents took action against employees Glenn and Tupy shortly after the election. As discussed above, Respondents changed their show call time from 7:30 to 8:00 on about June 1, and then for Tupy to 7:45 p.m., on about June 20. Tupy also received his discipline on June 20 for not adhering to the work new 7:30 call time. These changes from 7:30 p.m. to later times made their set up for the shows very difficult, at best, as discussed above. In fact, the original change made it nearly impossible for Tupy to do his job, such that DeStefano eventually caved, allowing him an extra 15 minutes. Notable, both Tupy and Glenn engaged in union activity, and Respondents knew about it. Respondents' knowledge is established by Saxe's comments to them just days before the election telling them that he knew they were pro-union, which also displays Respondents' animus.

Respondents' animus is also shown by the inexplicable nature of the change. Call times for the show were always at 7:30 p.m., and the only explanation DeStefano gave Glenn was that it was due to a "restructure." By now, that phrase alone is enough to show pretext. Moreover, Respondents would have to expect that the change would make their jobs more difficult, particularly because DeStefano confirmed with Glenn that she knew the sound check was the exact same time she was going to let them clock in for their shift. She ought to know the predicament she was putting them in, which shows that Respondents were unlawfully motivated in making the change.

Finally, regarding Tupy's discipline, the behind the scenes emails, including the "For the record" email described above, shows, just as Respondents did with Leigh, and all of the theater employees, DeStefano was setting the scene for a show that never was. Respondents' bald attempt to mislead through personnel records strongly supports a finding of animus.

Accordingly, the ALJ should that Respondents violated Section 8(a)(3) of the Act by reducing Glenn and Tupy's hours, creating more onerous working conditions, and disciplining Tupy as alleged in Complaint paragraphs 6(k), 6(n), and 6(o).

2. Withholding Light Duty and More Closely Supervising Urbanski was Unlawful

Applying *Wright Line*, the ALJ should find that Respondents withheld offering light duty to Urbanksi shortly after he was designated as the Union's election observer, and created more onerous working conditions for Urbanski, including by more closely supervising him in July. Urbanski engaged in a range of protected activity. Urbanski participated in the Facebook Messenger group chat. Urbanski attended the Union meeting on February 28 at the Elara. Urbanski signed a Union authorization card in the parking garage of the Saxe Theatre. Finally, Urbanski served as the Union's observer during the May 17 election. All of Urbanki's activity is well connected and know by and known by Respondents. Stage Manager Mecca was part of the Facebook Messenger group chat and, as discussed above, the evidence supports finding that Kostew told Estrada about the Union campaign. Moreover, employees told Mecca about the February 28 Union meeting. Finally, Saxe learned that Urbanski served as the Union's election observer.

The record shows that Respondents were hostile towards Urbanski's protected activity. To begin with, evidence of disparate treatment downright reveals Respondent's animus towards Urbanski. *See Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991) (finding evidence of disparate

treatment supports a finding of animus). First, Respondents' communications with Urbanski shows how they kept a closer eye on him as compared to other employees. Shortly after the Union election, Carrigan's tone changed a few days before the election and she stopped offering Urbanski light duty. Carrigan even threatened Urbanski with discipline. Moreover, during DeStefano's trip to New York she kept checking in, and emailed Urbanski detailed questions throughout the day to get an update on what he was doing because Saxe wanted to know what Urbanski was dong. Disparate treatment is also shown by Respondent's lack of similar email communications related to other employees. Saxe was in constant communication with Urbanski about little things and went so far as to make Urbanski respond, line by line, to his emails to him. Saxe could not testify that he required other employees to respond so meticulously. Respondents did not provide comparator emails for other employees who were required to respond as comprehensively as they made Urbanski do. Based on Respondent's failure to produce any such emails, the ALJ should find that such communication never occurred. This strikes at the heart of how was treated differently on account of his union activity.

The timing of Respondents' actions towards Urbanski, a few days before the Union election, lends further support for finding Respondents' were unlawfully motivated. From May 3 to May 10, Respondents were willing to accommodate his injury. From there, Respondents harangued Urbanski by trying to make him work while he was injured, which was not the case initially. The election took place on May 17. Urbanski requested light duty on June 1, but Carrigan went AWOL until June 19, and chastised Urbanski for alleged misconduct accused him of not wanting to work. Respondents then imposed Herculean task lists and reporting requirements on Urbanski. So, the timing could not be more revealing as to Respondent's unlawful motive.

Second, Respondents' communications with each other show how they kept a closer eye on him as compared to other employees. During DeStefano's trip to New York, she kept in communication with Saxe about Urbanski. DeStefano testified that she never communicated with Saxe while on vacation about an employee. Clearly, more supervisors were involved with keeping tabs on Urbanski than with other employees.

Finally, Respondent will likely argue that the General Counsel has not met the *Wright Line* burden because Urbanski was not disciplined, nor treated differently with regard to closer supervision than others, such that that there was no adverse action against him. However, the record establishes that Urbanski was treated adversely. Notably, the Board has recognized "closer supervision" as an adverse action. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064,1085-86 (2007); *Riley-Beaird, Inc.*, 259 NLRB 1339, 1349 (1982). Urbanski, as evidenced by Saxe's and DeStefano's communications with him, was subjected to closer supervision than he had ever experienced before. Previously, Urbanski worked independently to fix lights around the theatres. But then Respondents imposed strict requirements on Urbanski by keeping tabs on him, , sending him extremely detailed task lists, requiring him to respond line by line, and by requiring him to directly ask permission from Saxe or DeStefano prior to completing any task. There is no evidence Saxe or other supervisors implemented such demanding requirements on other employees.

Finally, Respondents wholly fail to meet its burden under *Wright Line* because Respondents' reasons are pretextual. Respondents did not provide comparator emails for other employees who were required to respond as comprehensively as they made Urbanski do. Such failure to produce evidence to their defense shows that Respondents did not subject other employees to closer supervision as it did to Urbanski. In short, a strong showing of pretext, as

here, forecloses the possibility that Respondent can meet its burden. *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

H. Under *Gissel*, the ALJ Should Grant a Remedial Bargaining Order

1. The Warehouse Technicians are an Appropriate Unit

Section 9(a) of the Act has been interpreted to require the Board to determine whether the petitioned-for unit is *"an* appropriate unit." The petitioned-for unit need not be the only appropriate unit, or even the most appropriate unit. *Wheeling Island Gaming,* 355 NLRB 637, 637, fn. 2 (2010) (emphasis in original), citing *P.J Dick Contracting,* 290 NLRB 150, 151 (1988) and *Overnite Transportation Co.* 322 NLRB 723 (1996). In *PCC Structurals Inc.*, 365 NLRB No. 160 (2017), the Board reinstated the traditional community of interest standard, as articulated in *United Operations, Inc.*, 338 NLRB 123 (2002), for determining whether a proposed bargaining unit constitutes an appropriate unit when the employer contends that the petitioned-for unit must include additional employees.

The traditional community of interest standard requires the Board to determine:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, supra, 338 NLRB at 123.

In *PCC Structurals*, the Board further held:

> ...applying the Board's traditional community of interest factors, the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit; and the Board may find that the exclusion of certain employees renders the petitioned-for unit inappropriate even when excluded employees do not share an "overwhelming" community of interest with employees in the petitioned-for unit.

365 NLRB No. 160, slip op. at 7. Finally, in weighing the shared and distinct interests of petitioned-for and excluded employees, "the Board must determine whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." 365 NLRB No. 160, slip op. at 11 (emphasis in original), quoting *Constellation Brands US. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016).

Here, the Warehouse Technicians share a community of interest with each other. They are organized into a separate department with its own departmental head, they report to the same set of supervisors (Saxe, Hunt, and sometimes Corrigan), and they are based out of the same location, the Oquendo Facility. They share common skills and training, in that they must be capable of fabricating props and set pieces for shows and building out offices and a stage. They must also be able to operate heavy and dangerous machinery, including welding machines, drills, grinders, table saws, miter saw, and chop saw. Moreover, Warehouse Technicians share the same core job functions, in that they all perform construction and maintenance types of work, both on projects for the offices, warehouse, and stage at the Oquendo Facility and props and set pieces for the theaters. Their work is highly functionally integrated, in that they always work together on their larger projects, such as building out the offices and constructing the stage and building and repairing props and set pieces for shows. Because of the degree of collaboration their work requires, Warehouse Technicians have contact with each other on a daily basis. Because their work is so similar, and they all hold the same job classification, the Warehouse Technicians are so interchangeable that there is no need for interchange amongst them. Finally, all the Warehouse Technicians have the terms and conditions of employment, working the same shifts and schedules, receiving similar pay rates, and having the same benefits.

The Warehouse Technicians' community of interest is distinct from the interests of other employees. Respondents argue that Porters, Runners,a dn the Electrician must be included in any

unit that includes Warehouse Technicians. The evidence, however, does not support this argument.

Porters belong to a different department from Warehouse Technicians, they report to work at the theaters: they have distinct job function, skills, and training in that their work is primarily janitorial and performed at the theaters; their work is not functionally integrated with the work of Warehouse Technicians, as they perform janitorial work and assist with limited customer-facing service work at the theaters and do not assist in any way with the work Warehouse Technicians do at the Oquendo facility; they have no contact with Warehouse Technicians; there is no evidence of temporary or permanent interchange with Warehouse Technicians; they have a separate line of supervision (Saxe, Theater Managers, Assitant Theater Managers, and sometimes Lead Ushers); and they have certain distinct terms and conditions of employment, including different shifts and a requirement that they wear uniforms (presumably both conditions required because of the customer-facing nature of their work).

Likewise, Runners work primarily on the road and in the office; they have distinct job function, skills, and training in that their work consists of transporting materials, supplies, and equipment to and between Respondents' facilities; their work is only minimally integrated with the work of Warehouse Technicians, in that they sometimes deliver items to Warehouse Technicians but do not collaborate with them in any way in performing their core function of performing construction and maintenance work for the Oquendo Facility and for props and set pieces for the theaters; they have minimal contact with Warehouse Technicians, in that they only see them momentarily at times when delivering items to the Oquendo Facility; and there is no evidence of temporary or permanent interchange with Warehouse Technicians. Although the Runners and Warehouse Technicians share common supervision and certain common terms and

conditions of employment, these factors are vastly outweighed by the characteristics that make the two groups' interests distinct.

Finally, although the Electrician works out of the Oquendo Facility and has a line of supervision similar to that of other employees, he works in a distinct craft, performing the unique function of doing electrical work and therefore needing unique skills in the craft of electrical work. Although there is some degree of functional integration and contact, in that the Electrician has performed electrical work on the same areas being built out by Warehouse Technicians, the record reflects that he does so independently of the Warehouse Technicians. Moreover, there is no evidence or temporary or permanent interchange between the Electrician and the Warehouse Technicians. Thus, the community of interest shared by the Warehouse Technicians is sufficiently distinct from the interests of the electrician to warrant the Electrician's exclusion from the bargaining unit.

In sum, a unit of Warehouse Technicians is appropriate under the Board's traditional community of interest principles.

2. Authorization Cards Show Majority Support

The Union achieved a majority status, as shown by authorization cards. As of April 11, five out of Respondents' eight Warehouse Technicians (Leigh, Montelongo, Rayner, Thomas, and Duran) had signed authorization cards. Moreover, by April 13, Stumpf was no longer working as a Warehouse Technician, so that, by that time, five out of seven Warehouse Technicians had signed authorization cards. On April 13, as discussed above, Saxe unlawfully interrogated employees and created an impression of surveillance, and, prior to April 11, Respondents had already effected their mass discharge and committed other unfair labor practices at the theaters. On April 17, Respondents discharged Leigh in violation of the Act.

Where, as here, a bargaining order is based on violations of Section 8(a)(1) rather than on a demand for bargaining, bargaining is ordered as of the earliest possible date when both of the following conditions are met: the respondent has commenced its unlawful conduct *and* the union has attained majority status. *Holly Farms Corp.*, 311 NLRB 273, 281 (1993) (citing *Multimatic Products*, 288 NLRB 1279, 1321 fn. 278 (1988); *Ultra-Sonic De-Burring*, 233 NLRB 1060 fn. 1 (1977), enfd. 593 F.2d 123 (9th Cir. 1979). Accordingly, in this case, the Union attained a majority status as of April 11, and bargaining should be ordered as of that date.

Respondents argue that the cards signed by Thomas and Montelongo should not be counted and that Thomas revoked his authorization card after he signed it.

In *Reeder Motor Co.*, 96 NLRB 831,834, the Board held:

> If a recently selected bargaining representative is to be divested of its authority, we believe it reasonable to require that the withdrawal of such authority be evidenced by clear and unambiguous conduct and with the degree of certainty required to establish the original designation for surely the necessary standards of proof in both these situations should be the same.[69]

Moreover, it is well established that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition. *Alpha Beta Co.*, 294 NLRB 228, 230 (1989) (citing *James H. Matthews & Co. v. NLRB*, 354 F.2d 432, 438 (8th Cir. 1965), cert. denied 384 U.S. 1002 (1966), and *NLRB v. Southbridge Sheet Metal Works*, 380 F.2d 851, 856 (1st Cir. 1967)). "A principal's revocation of his agent's authority is ineffective until communicated to the agent." *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432, 438 (8th Cir. 1965) (citing Restatement (2d) Agency, § 119(c), 1958; *Tinley Park Dairy Co.*, 142 NLRB 683, 685-686. Cf. *NLRB v. Hunter Engineering Co.*, 215 F.2d 916, 920 (8 Cir.)).

[69] See also *Brooks v. N.L.R.B.*, 348 U.S. 96, 99 (1964) where the Court held: Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation.

Colonial Knitting Corp., 187 NLRB 980 (1971), is instructive. In that case, a union started an organizing campaign in a unit of 5 employees. *Id*. at 981. Three employees signed union authorization cards. *Id*. On November 26, 1969, one of the employees called the union organizer and told him "forget about my signature." *Id*. He did not ask for the return of his card but told the union organizer that he would vote against the union if there were an election. *Id*. Two days later, the employee told the organizer that he had changed his mind. *Id*. The November 26 statement to the organizer was not an effective repudiation because "Santiago's "repudiation" by his statement to Lopez to "forget it" was not an effective repudiation. *Id*. at 981-982.

Similarly, in this case, Thomas "I don't want my name on the card or anything like that" and "no, no, no, take my name off the card, I don't want my card" is not an effective revocation of his Union authorization card. This language is not "clear or unambiguous" enough. Thomas never said that he no longer wanted to join the Union or be represented by them or even that he wanted his card back. Thomas could just as easily have wanted his name off his authorization card because he was afraid of what Respondents might do to him if they learned of his expression of support for the Union. Additionally, the record is not clear that Thomas even communicated this "revocation" with the Union. He called an unspecified number for an unspecified "IATS" "I…A..T..S..S..S.. E" or "something like that." No local union was identified and Thomas' search records were not entered into evidence. Therefore, Thomas' card counts towards the Union's majority support.

Respondents also claim that Montelongo did not fill out the card when he signed it and that he might not have understood what it was for. Nevertheless, Leigh credibly testified in great detail as to how Montelongo signed the card, whereas Montelongo appeared defensive and evasive. Moreover, even if Montelongo did not subjectively understand what the card was for,

"the very act of signing an authorization card by an employee, absent real proof of fraud or deceit, calls for a finding that the employee knew what he was doing." *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432, 438 (8th Cir. 1965). Indeed, "It has been held that an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Id.* above at 437(citing *Joy Silk Mills v. NLRB*, 185 F.2d 732, 743 (D.C. Cir. 1950). Montelongo admitted to signing the card and when he was shown the card he also admitted it was his. The authorization card Montelongo signed is clear and unambiguous on its face and recites expressly that the signer authorizes the Union to represent him for the purposes of collective bargaining. There is no credible evidence of fraud or deceit, and his afterthoughts do not negate him filling out and signing the card.

In sum, the Union achieved a majority status, as shown by five of the Warehouse Technicians signing authorization cards.

3. A *Gissel* Bargaining Order is Appropriate Here

In *Gissel*, 395 U.S. 575 (1969), the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election where an employer has committed unfair labor practices so serious that they make a fair election unlikely. The Board examines a number of factors in determining whether to impose a *Gissel* bargaining order remedy[70] including:

a. the presence of "hallmark" violations (unfair labor practices that are highly coercive and have a lasting effect on election conditions, such as threats of plant closure and job loss, *See, e.g., T&J Trucking Co.*, 316 NLRB 771, 773 (1995), *enforced mem*., 86 F.3d 1146 (1st Cir. 1996); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enforced mem.*, 47 F.3d 1161 (3d Cir. 1995); *NLRB v. Horizon Air Servs., Inc*., 761 F.2d 22, 31 (1st Cir. 1985); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292,

[70] See GC Memorandum 99-08, "Guideline Memorandum Concerning *Gissel*," dated November 10, 1999.

1301-02 (6th Cir. 1988), *enforcing* 287 NLRB 796 (1987), and the discharge of union adherents. See *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999), *enforced,* 267 F.3d 1059 (10th Cir. 2001).

b. the number of employees affected by the violation (either directly or by dissemination of knowledge of their occurrence among the workforce. See *Evergreen America Corp*., 348 NLRB 178, 180 (2006), *enforced,* 531 F.3d 321 (4th Cir. 2008); *NLRB v. Gen. Fabrications Corp*., 222 F.3d 218, 233 (6th Cir. 2000), *enforcing* 328 NLRB 1114, 1115 (1999); *Cardinal Home Products, Inc*., 338 NLRB 1004, 1010-11 (2003); *Aqua Cool*, 332 NLRB 95, 97 (2000); *NLRB v. Horizon Air Servs.,* 761 F.2d at 31; *Abramson, LLC*, 345 NLRB 171, 176-77 (2005); *Garvey Marine*, 328 NLRB 991, 993 (1999), *enforced,* 245 F.3d 819 (D.C. Cir. 2001); *Blue Grass Industries*, 287 NLRB 274, 276 (1987).

c. the identity of the perpetrator of the unfair labor. *M.J. Metal Products*, 328 NLRB at 1185; *Consec Security*, 325 NLRB 453, 454 (1998), *enforced mem*., 185 F.3d 862 (3d Cir. 1999); *NLRB v. Horizon Air Servs.*, 761 F.2d at 31.

d. the timing of the unfair labor practices. See, e.g., *Bakers of Paris*, 288 NLRB 991, 992 (1988), *enforced,* 929 F.2d 1427, 1448 (9th Cir. 1991). *See also M.J. Metal Products*, 328 NLRB at 1185; *State Materials, Inc*., 328 NLRB 1317, 1329 (1999) (unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp*., 320 NLRB 356, 368 (1995) (employer's "prompt" response), *enforced*, 134 F.3d 1307 (7th Cir. 1998); *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993), *enforced*, 44 F.3d 516 (7th Cir. 1995).

e. direct evidence of impact of the violations on the union's majority. *J.L.M., Inc*., 312 NLRB 304, 305 (1993), *enforcement denied on other grounds*, 31 F.3d 79 (2d Cir. 1994); *NLRB v. Horizon Air Servs.*, 761 F.2d at 32.

f. the size of the bargaining unit. *Compare Garvey Marine, Inc*., 328 NLRB at 993 (gravity of impact of unfair labor practices heightened in small, twenty-five-employee unit), *with Beverly California Corp.*, 326 NLRB 232, 235 (1998) (*Gissel* not warranted where unit was "sizeable"— approximately 100 employees—and violations generally did not affect a significant number of employees), *enforcement denied on other grounds*, 227 F.3d 817 (7th Cir. 2000).

g. the likelihood the violations will recur. *General Fabrications Corp*., 328 NLRB 1114, 1115 (1999), *enforced*, 222 F.3d 218 (6th Cir. 2000).

h. the change in circumstances after the violations. *Wallace International of Puerto Rico*, 328 NLRB 29 (1999) (Boards considers passage of time as a factor in evaluating whether to issue a *Gissel* bargaining order).

Moreover, the Board has issued *Gissel* bargaining orders based entirely upon independent Section 8(a)(1) violations, *Kinney Drugs, Inc.*, 314 NLRB 296, 297, 320-21 (1994) (ALJ, affirmed by the Board, determined *Gissel* bargaining order appropriate based entirely on Section 8(a)(1) violations), *enforcement denied*, 74 F.3d 1419 (2d Cir. 1996); *DTR Industries*, 311 NLRB 833, 845-47 (1993) (Board overruled ALJ and ordered *Gissel* bargaining order based on Section 8(a)(1) violations that included threat of plant closure and promised wage increase during critical period if employees voted against the union, which the employer later granted), *enforcement denied*, 39 F.3d 106 (6th Cir. 1994), including when the only "hallmark" violation was a threat of job loss. See *Four Winds Industries, Inc.*, 228 NLRB 1124, 1124-25 (1977) (finding *Gissel* bargaining order appropriate based solely on employer sending three pre-election letters to employees that communicated futility of union support; anticipatory refusal to bargain over mandatory subjects, such as union-security provision; and threats to discharge or permanently replace strikers), *on remand from* 530 F.2d 75 (9th Cir. 1976).

In this case, as described above, the Union has shown it has achieved a majority though authorization cards. Moreover, as shown below it is highly unlikely that traditional remedies will enable a fair election to be held given the severity of the combination of the "hallmark" violations and other violations of the Act; the timing of the violations; the fact that the owner and high ranking supervisors committed the violations; and the fact that the violations occurred in a small unit. Accordingly, a *Gissel* bargaining order is appropriate.

a. <u>"Hallmark" Violations</u>

Hallmark violations are often distinguished from lesser violations based on the "seriousness of the conduct" and often, that the conduct represents action as opposed to

statements. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980). Here, Respondents discharged Leigh, the sole Union organizer in a small unit of 8 employees within a week of starting the organizing campaign. The Board has held that the discharge of leading union adherents is a "hallmark" violation, *Douglas Foods Corp,* 330 NLRB 821, 822 (2000), had has a pervasive effect on other employees. The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work.' *Ethan Allen, Inc.*, 247 NLRB 552 (1980); see also *Atlanta Blue Print & Graphics Co.*, 244 NLRB 634 (1979). The discharge of the leader of the organizing effort, along with the 8(a)(1) violations, warrant granting a *Gissel* order. See *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 637-638 (2011) (respondent's discharge of the leader of the organizing effort along with threats and granting of wage increases warranted *Gissel* order).

Moreover, in a small unit, such as here, the impact of such discharges has a far greater effect than in a larger one and practically makes a fair election impossible.' *Pay 'N Save, …* 247 NLRB 1346 (1980); *Eastern Steel Co.*, 253 NLRB 1230, 1240 (1981); *National Propane Partners L.P,* 337 NLRB 1006 (2002). See also *Bridgeway Oldsmobile*, 281 NLRB 1246 (1986) (finding a Gissel order appropriate when respondent, in addition to several 8(a)(1) violations, respondent discharged the perceived union organizer who had collected 4 cards in a unit of 6 salesmen).

Moreover, the Board has found violations of the Act heightened in larger units than the one involved in this case. See *Garvey Marine, Inc.*, 328 NLRB 991, 995 (gravity of impact of violations heightened in relatively small unit of 25 employees); *Traction Wholesale,* 328 NLRB

1058, 1075 (same, 20 person unit); *NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 694 (7th Cir. 1982) (impact of unfair labor practices increased in "small unit" of 42 employees*);* *NLRB v. Bighorn Beverage,* 614 F.2d 1238, 1243 (9th Cir. 1980) ("probable impact of unfair labor practices is increased when a small bargaining unit . . is involved and increases the need for a bargaining order"). Cf. *Pyramid Management Group, Inc.,* 318 NLRB 607, 609 (1995), enfd. mem. 101 F.3d 681 (2d Cir. 1996) (the unlawful discharge of two union supporters, in the absence of other hallmark violations, insufficient to support bargaining order in a 69-employee unit); *Beverly California Corp.,* 326 NLRB 232, 235 (1998) (*Gissel* not warranted where unit was "sizeable" (92-103 employees) and violations generally did not affect a significant number of employees). *Philips Industries,* 295 NLRB 717, 718-719 (1989) ("the effect of violations is more diluted and more easily dissipated in a larger unit" of 90 employees).

Respondents' entire course of conduct at the theaters and Saxe's swift discharge of Leigh sends a clear signal to employees that anyone who solicits support for the Union will be fired. The sudden discharge of Leigh was unlikely to go unnoticed, and no employee would risk suffering the same fate. Therefore, Respondents' "hallmark" violations warrant issuing *Gissel* bargaining order.

b. Additional Factors a *Gissel* Bargaining Order is Appropriate

Respondent's numerous nonhallmark violations also support the issuance of a remedial bargaining order. *See Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (relying on "the coercive impact of the [employer]'s nonhallmark violations," in addition to "hallmark" violations, to decide that a *Gissel* bargaining order was appropriate); *General Fabrications Corp.*, 328 NLRB 1114, 1114-15 (1999) (considering "hallmark" and non-"hallmark" violations when deciding that a *Gissel* bargaining order was appropriate). As discussed above,

Respondents engaged in an entire campaign aimed at decimating support for the Union in the theaters, and Respondents violated Section 8(a)(1) of the Act on April 11 when Saxe interrogated Leigh about his Union activities and created an impression that their Union activities were under surveillance.

Moreover, the effect of the "hallmark" violations and multiple additional unfair labor practices on the unit employees was exacerbated, in part, because they were committed by the Respondents' highest-ranking officer, Saxe. Upper management's direct participation in the unlawful campaign serves to reinforce the coerciveness of the conduct, and together with the serious and widespread nature of these violations, makes it likely that these violations will have a continuing impact on all employees. See *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 6-7 (May 19, 2016) (*Gissel* bargaining order warranted, inter alia, because of the "gravity and coercive impact" of violations heightened because they involved employer's highest management officials); *NLRB v. Anchorage Times Pub. Co.,* 637 F.2d at 1370 (bargaining order warranted where "high level management personnel" committed violations and refused to disavow their coercive conduct); *Electrical Products Division of Midland-Ross v. NLRB,* 617 F.2d 977, 987 (3d Cir. 1980); *Amazing Stores, Inc. v. NLRB,* 887 F.2d 328, 330 (D.C. Cir. 1989); *Q-1 Motor Express,* 308 NLRB 1267, 1268 (1992) (*Gissel* order warranted where the respondent's pervasive scheme of unlawful conduct, which included discharges, threats, and other unlawful acts of intimidation made it unlikely that traditional remedies and the passage of time could alone ensure a fair election), *enforced,* 25 F.3d 473 (7th Cir. 1994). Cf. *Ace Heating & Air Conditioning Co.*, 364 NLRB No. 22, slip op. at 7 (June 15, 2016) (*Gissel* order not warranted where person who made threat of plant closure no longer employed by company and no evidence that any other member of management team acted unlawfully during the critical

period). In this case, Saxe still works at the Oquendo Facility and has not disavowed his unlawful conduct. The Board has observed that "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten. *M.J. Metal Products, Inc.*, above at 1185. Employees are not likely to forget that the person responsible for unfair labor practices has taken swift unlawful actions to eradicate union campaigns in the past still works there and could do the same to them.

Furthermore, Respondent's unlawful conduct was exacerbated by the timing of the violations. See, e.g., *Bakers of Paris*, 288 NLRB at 992 (*Gissel* bargaining order warranted, in part, because unlawful threats began when employer learned of union activity). Saxe took swift action in response to the organizing campaign generally and Leigh's organizing activities in particular. Within a week after Leigh started organizing Warehouse Technicians, Saxe interrogated him about his organizing activities, created an impression that employees Union activities were under surveillance, and unlawfully discharged him. This conduct "goes to the very heart of the Act" and is not likely to be forgotten. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941). "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity." *Consec Security*, 325 NLRB 453, 454 (1998). See e.g. *M.J. Metal Prod., Inc.*, above at 185 (in small unit of approximately 15 employees, the Respondent unlawfully discharged two union supporters 3 days after the Union requested recognition, and discharged two more about 2 months later, 3 days after the election.").

There is a great likelihood of recidivism here given that Respondents committed several other unfair labor practices after the May 16 election. An employer's continued misconduct after the holding of a representation election will further diminish the effectiveness of traditional remedies. *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 2 [at 1115], citing *Garney*

Morris, Inc., 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995). Here, after the election Respondents committed numerous violations of the Act: failing and refusing to offer Urbanski the opportunity to work light duty; imposing more onerous terms and conditions of employment on Urbanski by subjecting him to closer supervision, requiring him to obtain written consent from supervisors prior to perform any tasks, and assigning him more onerous tasks; imposing more onerous terms and conditions of employment on Tupy; and disciplining Tupy. The Board should consider this coercive conduct as a "backdrop" in assessing the impact that the more severe violations would tend to have on the Union's majority support "and on the election process itself." *Garry Mfg. Co.*, 242 NLRB 539, 539 (1979). Indeed, "the depth of the Respondents' disregard for employee rights is evidenced by the extreme measures it took to defeat the employees' organizational efforts." *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB 432, 434 (1999). As Saxe's tried and true methods of discharging and alienating Union supporters is likely to continue, it further warrants finding that a fair election is impossible.

The passage of time does not negate the issuance of a bargaining order. The unfair labor practices in this case occurred between March and July. Cases in which the Board denied enforcement of bargaining orders involved significantly longer lapses of time, with substantial portions of the delay attributable to the Board. See, e.g., *Montgomery Ward*, supra, 904 F.2d at 1156, 1160 (8 years between violations and order, including 6 years at the Board); Impact Industries, supra, 847 F.2d 379, 381 (7-1/2 years between violations and order, including 5-1/2 years at the Board); *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1138 (7th Cir. 1992) (over 9 years between violations and order, including 7 years at the Board). Finally, new employees may well be affected by the continuing influence of the Respondent's past unfair labor practices. As the Board has noted, "Practices may live on in the lore of the shop and continue to repress employee

sentiment long after most, or even all, original participants have departed." *Garvey Marine, Inc.*, 328 NLRB at 996 (citing *Bandag, Inc.*, 583 F.2d 765, 772 (5th Cir. 1978)). Respondents' violations are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described in cautionary tales to later hires. *Id*. Finally, turnover rate is not a relevant consideration under existing Board law concerning factors governing the issuance of a *Gissel* bargaining order. *J.L.M. Inc.*, 312 NLRB 304, 306 (1993)(citing *F & R Meat Co.*, 296 NLRB 759 (1989). As to employee turnover, there is no evidence that this turnover was not a result of the unlawful conduct. *Id*.

Respondents' blatant campaign to frustrate their employees' right to freely choose union representation cannot be countenanced. It is highly unlikely that traditional remedies will enable a fair election to be held given the severity of the combination of the "hallmark" violations and other violations of the Act; the timing of the violations; the fact that the owner and high ranking supervisors committed the violations; the fact that the violations occurred in a small unit. Accordingly, a issuing a *Gissel* bargaining order is warranted.

I. To Be Made Whole, the Discriminatees Must Be Compensated for Any Consequential Economic Harm They Have Suffered as a Result of Their Discharges

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often

not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v.*

Seven-Up Bottling of Miami, Inc., 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[71] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[72]

[71] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[72] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[73] In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[74]

[73] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[74] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991.

J. The ALJ Should Recommend That, to Restore Employees' Rights Under the Act Effectively, the Board Require Respondent to Conduct a Reading of the Notice to Employees and an Explanation of Rights

The Board has ordered additional remedies to dissipate the coercive effects of an employer's unfair labor practices when the possibility of a fair election has been jeopardized. *See, e.g., Federated Logistics & Operations*, 340 NLRB 255, 256-57 (2003) (ordering broad cease-and-desist order, public notice reading, and for the employer to provide the union with names and addresses of unit employees), *enforced*, 400 F.3d 920 (D.C. Cir. 2005); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (ordering public notice reading, union access to bulletin boards, equal time for union to respond to future employer meetings on union representation, and 30-minute union meeting on work time, and providing union with names and addresses of unit employees), *enforced in relevant part*, 97 F.3d 65, 74 (4th Cir. 1996). To determine whether remedies beyond a standard notice-posting or make-whole remedy are necessary, the Board considers, among other factors, the extent and nature of the violations involved, whether high-level managers commit the violations, the number of employees directly affected by the violations, and the timing of the violations. *See Federated Logistics*, 340 NLRB at 257. Based on these factors, the following additional remedies are warranted.

See Landgraf v. USI Film Products, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

1. Notice Reading

Public notice readings are necessary to effectuate the policies of the Act when an employer's unlawful conduct is "sufficiently serious and widespread" that employees need to be reassured that their rights "will be respected in the future." *Evenflow Transportation, Inc.*, 361 NLRB 1482, 1482 (2014) (quoting *Carey Salt Co.*, 360 NLRB 201, 202 (2014), and *Whitesell Corp.*, 357 NLRB 1119, 1124 (2011)). The Board has also found that a notice reading "is warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices." *Evenflow Transportation, Inc.*, 361 NLRB slip op. at 1 (quoting *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enforced mem.*, 273 F. App'x 32 (2d Cir. 2008)).

CGC requests a public reading of the notice by Saxe or by a Board agent in the presence of Saxe. *Id. See also Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000); *Audubon Regional Medical Center*, 331 NLRB 374, 378 (2000). Respondents' coercive conduct was severe and widespread, and Saxe, the face of Respondents' enterprise, was deeply involved in all of it. As such, requiring Saxe to personally notify employees that the facility will not be closed because of their support for the Union (or at least be present when a Board agent so notifies employees) will be far more likely to undo the effects of the violation than a notice posting alone. Respondent's violations also have demonstrably impacted employees' willingness to support the Union. A public notice reading will help to erase the lingering effects of Respondents' unlawful conduct by reassuring employees that their rights will be respected in the future by Saxe and all the supervisors and managers who report to him. A union representative should be permitted to attend this notice reading. Allowing a union representative to attend will provide employees with much-needed additional assurance that they can learn about union representation and support the Union if they choose. *See Texas Super Foods*, 303 NLRB 209, 209, 220 (1991)

(ordering employer's president/owner to sign and read notice in presence of union where president/owner had held captive audience meetings and personally threatened that employees would lose their jobs and a strike would be inevitable if the union prevailed at rescheduled election); *United States Service Industries*, 319 NLRB 231, 232 (1995) (ordering notice reading in presence of union in light of employer's "history of pervasive illegal conduct" during organizing campaigns), *enforced*, 107 F.3d 923 (D.C. Cir. 1997); *see also Chino Valley Medical Center*, 359 NLRB 992, 998, 1013-14 (Apr. 30, 2013) (ordering notice reading, with a union representative present, where employer committed "hallmark" violations prior to election and refused to bargain with union following certification).

2. Explanation of Rights

The Board has found that an explanation of employee rights under the Act should accompany a Board notice to employees when such an explanation is necessary "to undo the likely impact of the violations on the employees." *Pacific Beach Hotel*, 361 NLRB 709, 713 (2014) (explanation-of-rights remedy warranted to help undo the likely impact of the violations on employees and help remedy the chilling effect of the respondent's conduct where "here, the rights of the many employees have been suppressed for an extended period of time and in numerous ways"); *see also Latino Express, Inc.*, Case 13-CA-122006, 2016 WL 1211695 (Mar. 25, 2016) (unpublished order) (approving formal settlement stipulation including distribution of "Explanation of Rights" to employees where employer refused to recognize union and maintained rules precluding employees from any action that "jeopardizes company contracts or loss of revenues" or any activity that "causes harm to the operations or reputation" of company); *Gourmet Boutique West, LLC*, Cases 28-CA-145632, *et al.* (Aug. 24, 2015) (unpublished order) (approving formal settlement stipulation, including reading of "Explanation of Rights" by Board

agent, where employer, among other things, created impression of surveillance, interrogated employees, promised benefits, solicited complaints, and threatened employees by telling them that the facility would be sold if union was selected). This explanation would set out employees' "core rights under the Act, coupled with clear general examples that are specifically relevant" to Respondent's unfair labor practices. *Pacific Beach Hotel*, 361 NLRB at 714. Here, Respondents interrogated employees, made various coercive statements, and, most significantly, conducted a mass discharge in response to a union organizing campaign. The explanation of rights will reassure employees that they can support the Union without fear of retaliation, help restore Union support to the unit, and otherwise remove the chill caused by Respondents' conduct.

V. CONCLUSION

The record in this case is expansive, just as is the scope and severity of Respondents' conduct at issue. Based on the foregoing reasons, and the record evidence considered as whole, the General Counsel respectfully requests that the ALJ find that Respondents violated the Act as alleged in the Complaint. Through its conduct, Respondent infringed upon the core rights of its employees to engage in union activities without interference, restraint, or coercion. The ALJ should so find and recommend that the Board fashion an appropriate remedy which would require Respondent to: offer reinstatement to the unlawfully discharged employees, expunge the discipline at issue, cease and desist from imposing more onerous conditions on employees and subjecting them to closer supervision, and restore the working hours of the employees who had their schedules unlawfully reduced, along with all other remedies addressed herein, or found appropriate by the ALJ.

Signed at Phoenix, Arizona, this 8th day of January 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that General Counsel's Brief to the Administrative Law Judge in *David Saxe Productions, LLC and V Theater Group, LLC*, Cases 28-CA-219225, et al., was served via E-Gov, E-Filing, and E-Mail, on this 8th day of January 2019, on the following:

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